SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 246

CHARLES CORYELL, *et al.*,
Petitioners,

against

JOHN S. PHIPPS,
Respondent.

RESPONDENT'S BRIEF

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BRIEF FOR RESPONDENT PHIPPS

Statement

This is an admiralty suit by Charles Coryell, et al. against George J. Pilkington and John S. Phipps to recover for the loss of upwards of forty vessels consumed by fire on June 24, 1935 while stored in Pilkington's shed at Fort Lauderdale, Florida. The fire began on the houseboat *Seminole*, owned and operated by Seminole Boat Company, a corporation of which Phipps owned one-half the stock. All the vessels, including the *Seminole*, were in Pilkington's possession as bailee.

The Pleadings

The libel alleges that the *Seminole* was owned by Seminole Boat Corporation (*sic*) but predicates Phipps' liability upon the allegation that he "operated or controlled" her (R. 8). Phipps admitted that the *Seminole*

was owned by the Seminole Boat Company and denied that he operated or controlled her (R. 48-50). Upon petitioners' subsequent motion for discovery it was first asserted, in an affidavit of counsel, that Seminole Boat Company was a dummy corporation organized for Phipps' convenience (R. 62, 69). Thereafter, by leave of Court, respondent amended his answer to claim the benefits of the limited liability statutes, R. S. §§ 4283 and 4284 (R. 56-62).

The libel has never been amended to allege that Seminole Boat Company was a dummy corporation or was dominated by respondent.

The Trial

The trial consumed upwards of thirty court days and forty-five witnesses were called, of whom thirty-six testified in the presence of the Court. Findings of fact and conclusions of law, accompanied by a discussion,* were filed June 5, 1941 (R. 3582-90).

Facts

In 1915 respondent purchased from his brother H. C. Phipps a one-half interest in the houseboat *Seminole* (R. 1882-3, Exh. 4-P). In late 1928 or early 1929 respondent

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* The District Court's remarks under the heading "Discussion" do not meet the requirements of Admiralty Rule 46½ and do not have the force of findings. *Interstate Circuit Inc.* v. *United States*, 304 U. S. 55; *Fleischmann Construction Company* v. *United States*, 270 U. S. 349; *Harvey Co.* v. *Malley*, 288 U. S. 415; *Matton Oil Transfer Corp.* v. *The Dynamic*, 123 F. (2d) 999 (C. C. A. 2); *Java Coconut Oil Co. Ltd.* v. *Pajaro Valley National Bank*, 300 F. 305 (C. C. A. 9); *Lahman* v. *Burnes National Bank*, 20 F. (2d) 897 (C. C. A. 8); *Rasmussen* v. *Eddy's Steam Bakery Inc.*, 57 F. (2d) 27 (C. C. A. 9); *Macomber* v. *Goldthwaite*, 22 F. (2d) 638 (C. C. A. 9).

and his brother each sold his one-half interest in her to Seminole Boat Company, a Delaware corporation (R. 1882-3, 1894, 1900-3; Exh. 4-P).

The Seminole Boat Company was incorporated in Delaware on October 11, 1928 (Exh. T). The purpose of incorporating was to put the *Seminole* into the business of chartering for hire. Respondent and his brother each bought half the corporate stock. The corporation made a contract (Exh. CC, R. Vol. VI, pp. 19-21) with Captain Baker, an experienced charter boat master, to operate the *Seminole* in the charter business and she was put on the market for charter. In 1929 and 1930 she was chartered on several occasions but following the stock market crash there was no demand for vessels of her size and, although continued attempts were made to charter her and she was always available in the charter market up to the time of her destruction, no charterer was found for her after 1930 except the stockholders themselves (R. 1270-1, 1280, 1363-5, 1470-2, 1885-6, 1893, 1908-10, 1943, 1982, 1985-6; Exhs. V, W-1, W-2, 4-S and 4-V).

From the beginning the corporate directors were Paul Scott, R. C. Alley and Roy H. Hawkins who were respectively President, Vice-President and Secretary-Treasurer (Exh. U). They had full and complete charge of the management of the vessel. Until April, 1931, the President exercised active supervision over the business management. In that month he sent her to Pilkington's for storage and instructed the Vice-President to take charge with the assistance of Riley. These men, without interference from the stockholders, made all routine decisions as to her management, maintenance, upkeep, etc., being guided as to technical matters by the master and the engineer (R. 1277-8, 1351-2, 1363, 1370, 1471-3, 1479-81, 1503-5).

In February, 1935, the Secretary-Treasurer, upon his own initiative, ordered her removed from storage, taken to Miami and put into commission in the hope of chartering her. His letter (Exh. F; R. Vol. VI, p. 12) was signed "Seminole Boat Company". Captain Baker brought her to Miami where she was surveyed by an experienced ship surveyor who found her in all respects in good condition, after which she was placed at the charter dock and listed with all the leading brokers. However, no satisfactory offers for charter developed and the best offer to buy her was inadequate and was refused. On March 23, 1935 H. C. Phipps sold his stock in the Seminole Boat Company, one-half the outstanding shares, to Mrs. Amy Guest. Since that time the stock of Seminole Boat Company has been owned one-half by respondent and one-half by Mrs. Guest (R. 1273-4, 1282-1301, 1381, 1886, 2211-19; Exhs. V, W-3 and journal voucher 95 in Exh. Z).

In April, after the charter season was over and no charterer was found, the two stockholders and members of their family went on a ten-day fishing trip in the *Seminole*. During the trip no leak appeared anywhere in the gasoline tanks. The cruise ended at lower Matecumbe, below Miami, where all but the crew left the vessel. The Secretary-Treasurer of the company ordered Captain Baker to take the *Seminole* to Fort Lauderdale and store her with Pilkington. She was prepared for storage by the crew who left all her gasoline valves tightly closed. There were no leaks (R. 416, 1301-4, 1513-14, 1746-9, 1754-5, 1759, 1764-70, 1887-9, 1914-16, 1970-8, 1983-4).

The *Seminole* was left in Pilkington's custody at his pier on April 15th. Thereafter no one entered the *Seminole's* engine room by the authority of her owner or any person

connected with it until the day of the fire. Pilkington asked for the keys to the *Seminole* which were sent to him by letter dated April 20, 1935, signed "Seminole Boat Company" which Pilkington acknowledged by letter three days later (Exhs. 54, 61, R. Vol. VI, pp. 13-14). *After receiving the keys* Pilkington put the *Seminole* under his shed. Thereafter, almost every other day, he boarded and inspected her. He found nothing wrong with her, and neither saw nor smelled any gasoline. He went "on the boat, all through it, on Wednesday (5 days) before the fire and I didn't smell nothing and everything was in good shape" (R. 453, 459-62, 513-17, 1108-12, 1249-52, 1305-6, 1555-6, 1672, 1979).

On the day of the fire Seminole Boat Company employed an experienced boat captain, Abel, to go to Pilkington's and inspect the *Seminole*. Abel obtained the keys from Pilkington, entered the engine room and proceeded aft direct to the switchboard. He did not approach the gasoline tanks or valves which were situated in the opposite direction. After he had closed about five switches sparks occurred about a foot to the left of the last switch closed, followed by an explosion and fire. Abel did not survive (R. 254-8, 277, 525, 1537-9; Exhs. A and S).

What exploded was not shown. There was no proof that it was gasoline. Thomas, who accompanied Abel, smelled no gasoline either before or after the explosion (R. 260-2, 299).

After the fire the valves of each of the four gasoline tanks and two gasoline drain valves, which had been left shut tight when the *Seminole* was delivered into Pilkington's possession, were found open (R. 159, 165, 203-7).

Whether Pilkington,* one of his staff, or a trespasser opened them and left them open does not appear. There is no direct evidence that the gasoline tanks or their appurtenances leaked. How an inference that the tanks leaked is justified when the valves were open has not yet been made clear. Assuming *arguendo* that the explosion justifies an inference that there was gasoline vapor in the engine room, the inferred presence of such vapor cannot justify an inference that the tanks leaked because it is established by petitioners' first witness, Holm, that the valves were open. Any gasoline that got out of the tanks into the engine room is accounted for by the open valves. These were left shut tight when the *Seminole* was delivered into Pilkington's custody, and were not opened by any person for whom respondent or Seminole Boat Company is responsible, for no such person, except Abel, entered the engine room while the *Seminole* was in Pilkington's custody and Abel did not approach the valves (R. 256-7, 514-16, 1111, 1259, 1672, 1766-8, 1976-8).

Outline of Argument

The corporate point

From petitioners' brief it appears that the District Court sustained the corporate existence of Seminole Boat Company only because it found that petitioners had not been the victims of fraud† On the contrary the District Court

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* While the fire was still burning Pilkington admitted that he tried to run the generator while the *Seminole* was in his custody (R. 1100-1, 1113-14, 1310-11, 1545-7). To do so he must have opened at least some of the valves. He may have left them open.

† The fraud the Court found absent was not fraud in the sense of false dealing but fraud upon the law; cf. Powell on *Parent and Subsidiary Corporations*, p. 2.

found that proper corporate practice was observed and that the corporation was legitimately independent of its stockholders. In the following quotations from the District Court we have italicized the considerations other than fraud that led the Court to its decision.

"From the beginning and down to and including the time of the fire *the directors and officers of the corporation* were Paul Scott, R. C. Alley and Roy H. Hawkins, who were, respectively, president, vice-president and secretary-treasurer. These men, *as officers of the corporation,* assisted by James F. Riley, and advised by Captain Baker and other boat captains, *operated, controlled, maintained and managed the vessel* from the time of her purchase by the corporation down to and including the time of the fire." (Finding 4, R. 3583).

"The Seminole Boat Company was incorporated in good faith for the bona fide purpose of taking title to the *Seminole,* and operating her in the charter business, and long prior to June 24, 1935. While it made no profits and no charters after 1930, *it continued in existence as a bona fide corporation,* and *there is no* fraud or *other reason to disregard the corporate entity, pierce the corporate veil, or regard it as an agent of either of its stockholders.* It stands as a non-conductor between the libellants and Pilkington on the one hand, and the stockholders on the other" (Finding 12, R. 3586).

"The organization of the corporation, Seminole Boat Company, was a natural, normal development of ownership of a pleasure yacht, free from any fraud or ulterior motive in the inception of its chartering and creation. Likewise, *it was free of any of the other elements, treated in the reported and cited cases incident to the presence of bad faith, which apply the doctrine of piercing the corporate veil*" (Discussion, R. 3587).

"Seminole Boat Company, a Delaware Corporation, was at all pertinent times *a bona fide corporation, a valid creation of the law, not to be regarded as sham or fiction, or Phipps agent,* but as a legal non-conductor between Phipps on the one hand and libellants and Pilkington on the other, *because there was no* fraud or other *improper conduct or purpose in the creation or continued existence of the corporation*" (Conclusion 2, R. 3589).

The Circuit Court of Appeals found:

"In 1927 the boat was completely overhauled, and in 1928 the Phipps brothers organized the Seminole Boat Company, to which the boat was transferred in furtherance of the corporate purpose to enter the charter business for profit. The stockholders of the corporation held meetings, elected officers, kept minutes; and the corporation, *through its duly elected officers*, promptly took appropriate steps to launch the *Seminole* upon her career as a charter vessel" (Opinion, R. 3646; italics ours).

"At all times after the title to the *Seminole* was transferred to the corporation her movements were directed *by the officers of the corporation*, she was manned by a *crew employed by those officers*, and *all business dealings* in connection with her operation and management *were conducted by those officers*" (Opinion, R. 3647; italics ours).

"Upon these facts the court below found * * * that the Seminole Boat Company was incorporated in good faith for a valid purpose, and *no reason was shown to justify disregarding the corporate entity or treating it as agent and alter-ego of John S. Phipps;* * * * we think the evidence preponderates in favor of the findings made in each material instance" (Opinion, R. 3647-8; italics ours).

"In order to hold Phipps to personal liability, *appellants had the burden of establishing*, by a preponderance of the evidence, that the corporation was an artifice and a sham designed to execute illegitimate purposes in abuse of the corporate fiction and the immunity that it carries, and *that its activities in realty were those of Phipps personally.* This burden was not discharged" (Opinion, R. 3648; italics ours).

It is apparent from the above that both courts concurrently found as a fact that the corporation was conceived and continued in existence in good faith for proper corporate purposes and that it was independent of any improper influence or control by respondent. As the Circuit Court of Appeals said (R. 3648) "the basic dispute turns upon the ultimate facts". We shall show that there is ample evidence in the record to support the concurrent findings

below and that there is no basis under the authorities for brushing aside this bona fide corporation on the ground that it was dominated by respondent.

The limitation point

The District Court found that the *Seminole* was largely rebuilt in 1927-8 (R. 3583); that the installation of the tanks was proper (R. 3587), and that respondent "was without privity or knowledge, even though he should be considered as owner" (R. 3588-9).

The Circuit Court of Appeals found that:

"It is undisputed that the vessel had been examined and pronounced fit by an experienced ship surveyor in February, 1935; that she developed no flaws during the cruise or prior to reaching Pilkington's; that the crew left her gasoline valves closed, her electric switches open, her gas tanks registering empty, and her bilges clean and free of gasoline or gasoline vapor; and that she was repeatedly examined by competent men between April 15 and June 24, 1935, who discovered nothing wrong with her" (R. 3647).

The Circuit Court of Appeals held:

"The evidence affirmatively establishes that no actual privity to or knowledge of the defective condition obtaining upon the *Seminole* was attributable to Phipps personally, and that none could be imputed to him since he had exercised due care and diligence in selecting competent men to man the vessel, and had imposed upon them full duties as to inspection and maintenance of her" (R. 3649).

We shall argue that in the case of an individual vessel owner* such as this, privity or knowledge sufficient to deprive him of the benefits of the limitation statute must be

* Phipps must be regarded as one of two individual co-owners if the corporation is disregarded.

personal and may not be imputed, and shall show that the evidence will not support any finding other than that made by both Courts below, viz., that respondent was in fact without privity or knowledge.

Concerning petitioners' argument that a proper system of inspection was not maintained we shall show that there were two systems of inspection, one by the master and one by the bailee in possession; also that the rule relied upon by petitioners concerning the necessity for inspections, while applicable to vessel owners in possession of and operating their vessels, has never been applied to a vessel owner not in possession but whose vessel has been delivered to a competent bailee for storage where the bailee is charged with the duty of inspecting.

As to petitioners' argument that the officers of Seminole Boat Company were respondent's alter egos, whose privity and knowledge are his, we shall show that the alter ego doctrine is limited in its application to corporate vessel owners and is not applicable to individual vessel owners.

POINTS

I. The Seminole Boat Company was an independent legal entity not dominated by Phipps.

Having failed to prove the allegations of their libel that Phipps "operated or controlled" the *Seminole* (R. 8) petitioners attempt to show that the corporation which owned, operated and controlled her was so dominated by Phipps that it ceased to have independent existence, from which the conclusion is drawn that Phipps must be regarded as one of two individual co-owners and is liable. Petitioners seek to apply to a small, specialized and separate charter-

ing venture the authorities applicable to great corporate structures and would hold this small venture of two stockholders to the protocol incident to vast and successful corporate enterprise. A review of the evidence will show that Seminole Boat Company was legitimately conceived for a proper purpose and that its affairs were controlled by its officers and directors without undue interference by either of its stockholders. In a certain sense all corporations are dominated by their stockholders but such domination does not destroy their legal existence unless it be out of character as stockholder for improper purposes. Petitioners ignore the fact that one who owns one-half the stock of a corporation is entitled to evidence a legitimate, even an active, interest in the affairs of the corporation.

The formation of the corporation

Seminole Boat Company was organized in 1928 to put the *Seminole* in the public chartering business. Baker, with whom a contract was later made, convinced the Phipps brothers that he could put the boat in the charter business at a profit to them "and make a good living out of his share". The Phipps brothers considered the plan good and caused the corporation to be formed (R. 1364-5, 1389, 1396, 1399, 1470-1, 1885, 1908-9).

A certificate of incorporation was duly filed with the Secretary of State of Delaware on October 11, 1928 (Exh. T, offered R. 1271). The incorporators met on the following day and adopted by-laws, designated a Delaware agent, authorized the directors to issue the capital stock, and elected Scott, Alley and Hawkins directors. Thereafter the Board of Directors held annual meetings as required by the by-laws and special meetings in addition, nine in

all, prior to the destruction of the *Seminole*. The stockholders likewise held annual meetings at the time fixed by the by-laws from 1931 to 1935 inclusive. Among other things officers were elected annually, the Treasurer was authorized to open a bank account, a place of business was established, a corporate seal was adopted, a form of stock certificate was adopted, the officers were authorized and directed to procure the necessary authority to transact business in any State, counsel was appointed, the purchase of the *Seminole* for stock was approved and confirmed, the President was authorized to employ Baker to put the *Seminole* in the chartering business, and the form of that contract was approved (Exh. U, offered R. 1272).

All requisite tax returns were filed and taxes due paid each year, including Federal income tax and Federal, Florida and Delaware capital stock taxes (R. 2578-9).

The issuance of stock

Stock certificates were procured, a stock book kept, and stock certificates were issued. Originally ten shares were issued, divided between Scott, Alley and Hawkins. In due course these were transferred, five shares to John S. and five shares to H. C. Phipps. Subsequently thirty additional shares were issued, fifteen to John S. and fifteen to H. C. Phipps. It is noteworthy that when H. C. Phipps sold his stock to Mrs. Guest in 1935 his certificates were surrendered and cancelled and a new certificate for twenty shares, one-half the outstanding shares, was issued to Mrs. Guest. If the corporation was not a living, legal entity this would not have been done, but it was done only *three months prior to the fire* (R. 1272-4, 1301; Exhs. V and W-1-3, offered R. 1272-3).

The contract with Captain Baker

To accomplish the purpose for which the corporation was formed the President negotiated a contract with Captain Baker by which the corporation employed Baker as master of the *Seminole* and agreed to pay him $200 per month and 30% of the net profits of the operation. Baker in turn agreed to "maintain and operate" the *Seminole* "for the primary purpose of doing a public chartering business" (Exh. CC, offered R. 1279, printed R. Vol. VI, pp. 19-21). Pursuant to this contract the *Seminole* was delivered to Baker who in 1929 and 1930 made several charters and collected a total hire upwards of $12,000 (Exh. X, account entitled "Charter of *Seminole*", offered R. 1274). Although Baker offered her for charter thereafter right down to the time of the fire, she was too large and expensive to operate following the stock market crash and no further charters could be obtained (R. 1280, 1353, 1943, 1982-3, 1985-6). In spite of the fact that the *Seminole* was difficult to charter in the financially dark days from 1930 to 1935 the Seminole Boat Company continued in business and kept her available for charter at all times. Hawkins testified that "the boat was always available for charter". In 1935 when she was put into commission Baker hoped and thought he could charter her and she was put at the Royal Palm Dock, the center of Miami charter activity, so that she would be more readily available for inspection by prospective charterers. A "For charter" sign was displayed on her (R. 1284, 1373, 1382, 1399).

The financing of the corporation's business

While the Seminole Boat Company was formed in November, 1928, it did not begin to do business until October, 1929, when it made its contract with Captain Baker (Exh. CC, R. Vol. VI, pp. 19-21). Baker agreed to "maintain and operate" the *Seminole* and was to receive the charter hire, pay the expenses in the first instance and "account for all moneys and revenues derived from the operation of said boat and pay over to owner promptly all moneys above the cost of operating said boat, the same to be divided under the terms hereof" (Exh. CC, R. Vol. VI, p. 20). With this contract in force there was no need for the corporation to have a large working capital.

Petitioners stress Exhibit 4-D.* According to that document, in 1929 proceeds from charter hire were $8,544.38, less than the operating expenses and the deficit was made good by loans from Boulevard Mortgage Company; in 1930 proceeds from charter hire were $4,284 and the deficit was again made good by loans from Boulevard Mortgage Company. There is no suggestion in the record that the Seminole Boat Company did not have adequate capital or credit with which to meet all its ordinary needs. There is no suggestion that any creditor ever went unpaid. There is no proof that lack of funds or credit caused anything to be done or left undone that contributed in any way to the fire or petitioners' losses.

It is not for petitioners to complain of the financing of Seminole Boat Company. Their claims do not arise out of any voluntary dealings with it or the *Seminole*, or any lack of finances to meet the "normal strains" of the business.

* This was offered for identification merely (R. 1659).

Petitioners' claims arise out of an alleged tort upon the occasion of which the principal asset of the company was destroyed. If, as petitioners say, Seminole Boat Company was an "empty shell" it was such only after the fire. Prior thereto it had valuable property in the *Seminole* and the Prigg boat and substantial credit.

The corporation's books of account

Books of account were kept in which the Seminole Boat Company's receipts, expenditures, assets and liabilities were fully and accurately recorded (Exhs. X, Y and Z, offered R. 1274-5). Inasmuch as no annual net profits were realized the deficits were made good by the stockholders. Appropriate accounts were maintained in the name of each stockholder, recording the indebtedness of the corporation to the stockholders for the amount of their advances. When H. C. Phipps sold his stock to Mrs. Guest a balance was struck showing that the corporation was indebted to him for past advances in the sum of $12,440.72 and this was transferred to Mrs. Guest's account and entered on the books of the corporation as a debt to Mrs. Guest. This entry was made on June 22, 1935, *two days before the fire*. The making of these corporate records is inconsistent with sham and establishes a living, *bona fide* corporation (R. 1664-5, 1686-7, 1698-9, 1718-19; see accounts in the names of Mrs. Guest, H. C. Phipps and John S. Phipps in Exh. X; also journal vouchers 95 and 96 in Exh. Z).

Counsel were at pains to elicit from the bookkeeper that the transactions recorded in the Seminole Boat Company's books were already fully recorded on the books of the Palm Beach Company or the Boulevard Mortgage Company, which made payments for Seminole Boat Company

after that company's bank account was closed out. Counsel contended that Seminole Boat Company's books were, therefore, a "superfluity" (R. 1673-5, 1703). It follows, however, not that the books were "superfluity" but that they served a very real purpose, viz., the purpose of the Seminole Boat Company to keep *its own* records as a going concern. The very keeping of its own books in these circumstances proves a settled purpose to maintain the independent existence of the corporation (R. 1698-9, 1722-4). *In re Watertown Paper Company*, 169 Fed. 252 (C. C. A. 2), the fact that separate books were kept was held significant by the Court in concluding that a creditor of the bankrupt paper company was a separate entity from the bankrupt and entitled to assert a claim against the bankrupt's estate (pp. 255, 257).

Between January 1, 1935, and the day of the fire Boulevard Mortgage Company paid thirty bills incurred in respect of the *Seminole* (Exhs. GG to 3-J, inclusive, offered R. 1322-46). In every instance but three* these payments were charged against Seminole Boat Company when the checks were drawn, as appears on the duplicate vouchers. Those payments are typical of the method in which the Seminole Boat Company's bills were paid and charged following the closing out of its own checking account and clearly establish the *bona fide* existence of Seminole Boat Company as a separate entity individually charged with and responsible for its financial obligations.

The same care was exercised by Palm Beach Company when it paid the Seminole Boat Company's bills. Payments

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*These were for food supplies, newspapers, laundry, etc., on the 1935 cruise, i. e., consumable stores, and were charged to Phipps personally because he incurred them personally (Exhs. ZZ, 3-I and 3-J).

were contemporaneously charged against Seminole Boat Company, a practice consistent only with the understanding that Seminole Boat Company continued to exist as a living, separate entity. The engineer's wages were charged against Seminole Boat Company (vouchers 8032 and 8444 in Exh. 3-U, offered R. 1512). The wages of the captain hired to inspect the *Seminole* on the day of the fire were charged to Seminole Boat Company, as was the gasoline he purchased for his automobile to make the trip (voucher 8320 in Exh. 3-V, offered R. 1517; Exh. 4-I-2, offered R. 1730). Each payment to Pilkington for storage of the *Seminole* was charged to Seminole Boat Company (Exh. 75, offered R. 1536).

The payment of the corporation's bills by others

The fact that the Seminole Boat Company's bills were paid by Boulevard Mortgage Company and Palm Beach Company does not indicate an abandonment of the corporate existence or domination by respondent. These companies were fiscal agents of Seminole Boat Company. Credit was extended to Seminole Boat Company not its stockholders. The payment of Seminole Boat Company's personal property tax on February 2, 1935, is an example. On the duplicate voucher check, drawn by Boulevard Mortgage Company, Seminole Boat Company was charged with $53.01, the amount of the tax (Exh. GG, offered R. 1322-5). Palm Beach Company paid Boulevard Mortgage Company, in turn debiting Seminole Boat Company, and was repaid by two Bessemer Investment Company checks from the stockholders' funds (Exhs. 5-G and 5-H, offered R. 2178-9).

How careful Boulevard Mortgage Company and Palm Beach Company were in distinguishing between Seminole

Boat Company and its stockholders appears throughout the record. Of the thirty payments made by Boulevard Mortgage Company in 1935, prior to the fire, eight cover items that were in part for Seminole Boat Company and in part for Phipps. They were distinguished, separated and charged accordingly. Two are particularly noteworthy. Exhibit NN (offered R. 1332) covers payment for wharfage on two boats, the *Seminole* and *K-21215*, a fishing boat owned by Phipps. That portion covering the *Seminole* was charged to Seminole Boat Company but that portion covering the fishing boat was charged to Phipps. Exhibit ZZ (offered R. 1340) covers certain expenses for the *Iolanthe* (owned by Phipps) and *two classes* of expenses on the *Seminole*, viz., stores consumed during the 1935 cruise and maintenance expenses and wages prior thereto. Those for the *Iolanthe* were charged to Phipps because he owned it. The consumable stores on the cruise were likewise charged to Phipps because they were personal expenses, but the maintenance items and wages incurred in putting the *Seminole* in commission in the hope of chartering her were charged to Seminole Boat Company. It is clear that those concerned well knew the distinction between Seminole Boat Company, a corporation, and its stockholders, and acted upon that difference consistently.

The willingness of Boulevard Mortgage Company and Palm Beach Company to extend credit to Seminole Boat Company does not show domination of Seminole Boat Company by Phipps. He owned only one-half the stock of that company and only 20% of the stock in the parent holding company that controlled Boulevard Mortgage Company, Palm Beach Company and Bessemer Investment Company. After June, 1932, he did not even own a benefi-

cial interest in that 20%; he transferred it to a trustee in trust (R. 1473-5; Exh. 3-R, offered R. 1475). There is no proof that Phipps dominated any of these companies or that they extended credit to Seminole Boat Company because of his interest in that company. On the contrary these companies extended credit to all the members of the Phipps family, to corporations in which they owned an interest and to corporations in which they had no interest. Boulevard Mortgage Company, for example, paid bills for seventeen other corporations and nine individuals. Palm Beach Company did likewise (R. 1321, 1355-60, 1482-4). It is plain, therefore, that Boulevard Mortgage Company and Palm Beach Company extended credit to Seminole Boat Company because of a settled practice of long standing and not because of any personal domination of Seminole Boat Company by Phipps.

In *In re Watertown Paper Company*, 169 Fed. 252 (C. C. A. 2), the pulp company had no bank account and all its bills were paid by the bankrupt paper company. Nevertheless the Court held that the two corporations were separate entities and that the pulp company was entitled to assert a claim against the bankrupt.

The lack of a bank account

Seminole Boat Company had a checking account from 1928 to 1931. In the latter year, when the President decided to put the *Seminole* in storage, he closed out the bank account because it was so small that the bank imposed a service charge (R. 1275, 1416, 1472). Since the corporation was unable to charter the *Seminole* it had no income and no funds to bank. That fact, however, does not make it any the less a corporation. Even if it had

been insolvent or bankrupt its corporate existence would still continue. In *Petrogradsky M. K. Bank* v. *National City Bank of New York*, 253 N. Y. 23, Judge Cardozo wrote:

"Neither bankruptcy * * * nor cessation of business * * * nor dispersion of stockholders, nor the absence of directors * * *, nor all combined, will avail without more to stifle the breath of juristic personality. The corporation abides as an ideal creation impervious to the shocks of these temporal vicissitudes" (pp. 31-2).

Solvency is not the test of corporate existence and the lack of a bank account does not prove that a corporation is dominated improperly by its stockholders. Few corporations show net profits at the outset but they are none the less live legal entities. The length of time they continue to live on capital or credit instead of income cannot be the criterion of their life span. Here the corporation preserved its principal asset, the vessel, kept it in condition, and offered it for charter during the season immediately prior to the fire. While it did no business it had not ceased trying to do business.

The corporate deficits and their payment by the stockholders

Whether the stockholders were prudent investors in continuing to pay deficits is immaterial. The main asset of the corporation was preserved and offered for charter, which was the business of the corporation. The payment of deficits by the stockholders was consistent with the hope that better times would come in which the losses might be recouped (R. 1399). Many a stockholder in a brewery corporation paid assessments in the prohibition years in the hope, realized since repeal, that business might resume.

No domination by respondent is suggested by the payment of the deficits. He did not pay them all. He owned one-half the stock and paid only one-half the deficits (R. 2175-82; Exh. 5-E, offered R. 2176).

In *Peterson* v. *Chicago Rock Island and Pacific Ry. Co.*, 205 U. S. 364, this Court quoted with approval the following langauge from *United States* v. *American Bell Telephone Company*, 29 Fed. 17:

"For one person to supply means for another to do business on is not the doing of that business by the former" (p. 393).

In *National Labor Relations Board* v. *Timken Silent Automatic Co.*, 114 F. (2d) 449 (C. C. A. 2), the Court said:

"Nor does an agreement to assume and discharge the obligations of the subsidiary operate as a merger of the two" (p. 451).

A corporation may validly borrow money from its stockholders and such a transaction does not establish improper domination. *Arnold* v. *Phillips*, 117 F. (2d) 497 (C. C. A. 5), cert. denied 313 U. S. 583.

In paying the deficits payments were made by Bessemer Investment Company on behalf of the stockholders direct to the creditor companies rather than to Seminole Boat Company for transmission by it to its creditors because Bessemer Investment Company acted as a financing agent for various members of the Phipps family, had running accounts with the creditor companies but had none with Seminole Boat Company (R. 2193-4). This was a matter of convenience merely and does not spell improper domination or break-down of the corporate existence

The purchase of the Prigg boat

There is no foundation for petitioners' suggestion that the circumstances of the purchase of the Prigg boat in 1935 showed either improper domination by respondent or a break-down of the corporate entity. Both stockholders, not respondent alone, were consulted and both approved of the purchase by Seminole Boat Company before title was taken by that company, and before the purchase price was charged to it. The stockholders were consulted because of the financial position of the company and not because of the abandonment of the corporate entity. The corporation had had no business income for some time, and the amount involved was substantial. The effect of the purchase would be to increase the deficit. No prudent officer of a business corporation in such financial circumstances could be expected to add another vessel to the "fleet" without the stockholders' approval. The fact that the stockholders were consulted establishes merely that the officers conducted the affairs of the company with an eye to the actual financial position. The purpose in buying the boat was to make the *Seminole* more attractive to prospective charterers by providing her with a better tender (R. 1333, 1463-4, 1886-7, 1942).

The proposed sale of the *Seminole* in 1935

Petitioners suggest that the fact that the stockholders were consulted about the proposed sale of the *Seminole* indicates a break-down of the corporate entity. On the contrary no one can reasonably deny that it is proper corporate practice for the officers of a corporation to consult the stockholders as to the possible sale of the entire corporate business. The proposed sale was tantamount to a proposal

that the corporation go out of business. It is true that the stockholders were not called into formal session and the gavel rapped to bring them to order. They were consulted informally, but the wheels of industry would be retarded to no purpose if in small businesses, formal stockholders' meetings were necessary in such situations.

Moreover, respondent did not make the decision. *Both* stockholders were consulted. They could not agree, respondent desiring to have the corporation continue in business and his brother desiring to sell. The stalemate was resolved by the sale of respondent's brother's stock to Mrs. Guest. If the corporate concept had been abandoned, or if respondent truly dominated the corporation, he would merely have taken the boat and paid his brother for his share. In fact, however, he found a new co-stockholder and the business continued (R. 1295-1301, 1381, 1389-90, 1886, 1914).

The independence of the corporate officers

Petitioners cite no authority to support their argument that a corporation is but a personal venture of the stockholders unless its officers have some financial interest in it or are paid for their services. These are not legal prerequisites to independence but matters of private bargain. The corporation earned no profits out of which to pay salaries. If it had nevertheless paid them and the stockholders made them good, petitioners would argue that this was a break-down of the separate entity. The motives of the officers in undertaking the corporate function are not important. *None of these men was in respondent's employ.* They were employed by corporations in which respondent had only a 20% interest in trust (Exh. 3-R 1-3, offered R.

1475). There is no proof that respondent dominated the corporate employers of these men or that he dominated the family. If the willingness of these men to function for Seminole Boat Company arose from the fact that Phipps was a member of the family that ultimately controlled their employers, this does not establish either that Phipps dominated the Seminole Boat Company unduly or that it was not a corporation. The fact that respondent owned only one-half the stock is completely ignored.

The fact that the officers were "family representatives" in some sense, does not establish that they were respondent's representatives when acting for the *Seminole* any more than it would establish that Hawkins acted for the Seminole Boat Company when he sold the *Iolanthe*, Phipps' own boat (R. 1368-9). One may act as agent for many persons separately within the span of a day, or an hour.

In contending that the officers were subject to respondent's orders and therefore not independent petitioners lose sight of a vital distinction. When these men acted for a member of the family in a personal matter they acted for the individual, but when they acted for a corporation they were its servants, not its stockholders.' In the final analysis the stockholders control but the exercise of control by the stockholders is not a violation of the corporate concept but an incident of it. In *Eichelberger* v. *Arlington Building Inc.*, 280 Fed. 997, the Court said:

"It is true that the stockholders control it, but that surely does not render it invalid" (p. 1000).

Only improper, over-bearing interference by a stockholder, out of character as stockholder and for purposes other than proper corporate purposes, will justify a disregard of the corporation. Petitioners have proved no such improper interference here.

That it was a family corporation is of no moment. Consanguinity of stockholders does not destroy the corporate being. *The E. S. Atwood*, 289 Fed. 737, 740 (C. C. A. 2).

The fact that Hawkins and Riley each had a mental limit to the amount he would spend on the *Seminole* without consultation with the stockholders is no proof of undue domination. Hawkins felt he should not spend more than $500 without approval; Riley $200 to $300. *It is undisputed, however, that Phipps had imposed no such limit and was not aware of it.* Hawkins' and Riley's feelings in this matter are fully accounted for by the financial position of the corporation. Moreover, as the books of account show, it was a rare occasion indeed when these self-imposed limits were effective because it was seldom that there was any occasion to spend as much as $300. Only one item of expense in 1935, prior to the fire, exceeded that amount (Exh. 5-G-3, offered R. 2178; Exh. 5-1-3, offered R. 2181). This was the Prigg boat referred to *supra*, p. 22. There is nothing here that indicates domination by respondent for whenever one stockholder was consulted *both* were consulted (R. 1334, 1380, 1462, 1484, 1492-3, 1505-6, 1912-14, 1940-2).

When the stockholders were consulted the expense approved was charged to the corporation, not to the stockholders individually, which establishes that they were consulted as stockholders, not in their personal capacities. It is not correct to say (Petitioners' Brief, p. 24) that the officers "dared not incur any major expense for repairs of the *Seminole* without obtaining the approval of the Phipps family". Respondent had imposed no limit whatever (R. 1912-13). When Riley consulted both stockholders in 1933 about overhauling the motors the bills were charged to the Seminole Boat Company, not the stockholders personally

(Exhs. 3-T-2 and 3-T-4, offered R. 1501). Compare the meager activities of the stockholders here with the activities of the officers of the allegedly dominating corporation in *Pennsylvania Railroad Company* v. *Jones*, 155 U. S. 333, where this Court sustained the corporate entity.

The stockholders' use of the *Seminole*

After the President decided to lay up the *Seminole* in 1931 she was used by one or the other of the stockholders on four occasions only. In March-April, 1932 she was used by both stockholders, not respondent alone (R. 1507-8). There is no proof that the use in August, 1932, was by respondent. Riley used a grocery list for that trip only to refresh his recollection as to when he and respondent first visited Pilkington together three or four months before the trip. Phipps remembered no trip in 1932 (R. 1643, 1916-17). There is no proof that the *Seminole* was put in commission in March-April, 1934, for respondent's use. Hawkins' letter of March 20, 1934 (Exh. 46, R. Vol. VI, p. 10) was signed with respondent's typewritten signature by mistake and without authority (R. 1407-8, 1893). In 1935 the *Seminole* was not put in commission for any trip but, as the Court found (R. 3584), Hawkins put her in commission "upon his own initiative" to offer her for charter or for sale. The 1935 cruise was originally planned in another boat and the *Seminole* was used only after all hope of chartering her during the then current season had vanished, and after Mrs. Guest had bought H. C. Phipps' stock. The cruise lasted ten days only (1282-3, 1373, 1824; 1887-8).

Respondent considered himself a charterer when he used her (R. 1917). In *The Virginia*, 264 Fed. 986, aff'd 278 Fed. 877 (C. C. A. 4), cert. denied 257 U. S. 659, the Director General of Railroads was held to be a charterer although

he took possession of the vessel without contract with the owner and fixed his own terms of hire.

In the summer of 1929, before the contract with Baker was made and before the corporation embarked upon the business of chartering, Phipps sent her north for the use of his father who was 89 years old and in failing health. While the other stockholder, respondent's brother, was apparently not consulted his assent may be assumed under the circumstances (R. 1898-9). Upon the conclusion of that trip the corporation made its contract with Baker whereby he was to serve as master in the chartering business. Phipps had no part in the making of that contract which was negotiated by one of the officers of the company (R. 1278-9, 1364-5).

The pennants of the Phipps brothers were of the same design but alternate colors. There is some doubt which was flown (six years before the fire), but there is no proof that respondent authorized the flying of his pennant (R. 347, 395-6). However, the flying of a flag cannot establish domination of a corporation. Every user of a yacht is entitled to fly his flag whatever his relation to the owner.

It is of importance to remember that petitioners' losses were not in any sense incurred as a result of the stockholders' use of the *Séminole*. She had been in dead storage for upwards of two months when the fire occurred. In *National Labor Relations Board v. Timken Silent Automatic Co.*, 114 F. (2d) 449 (C. C. A. 2), the Court said:

"Although the original respondent was its wholly owned subsidiary there is no showing here made which gives sufficient ground for disregarding the separate corporate existence of the two. *No control by the parent may be said to have wronged or defrauded anyone with whom these proceedings are concerned and without proof of that sort of dominance the parent stockholder is not to be treated as one with the subsidiary corporation*" (p. 450, italics ours).

Relations with Pilkington

The District Court found that the storage contract was implied and that the parties to it were Pilkington and Seminole Boat Company (R. 3586). There is no evidence to connect respondent with the contract for the storage of the *Seminole*. Pilkington testified that about April 2, 1929, Phipps told him that Riley had been appointed to take charge of the boat and said "you need not bother taking any business up with me whatever" (R. 429). Pilkington testified that Phipps discussed the *Seminole* with him "only when he came down there this time when he introduced me to Mr. Riley." (R. 430).

Pilkington never billed Phipps for storage charges of the *Seminole* (Exh. 75, offered R. 1536) and on Pilkington's books Phipps does not appear as the person liable for the storage charges (Exhs. 82-7, offered R. 664-673). Some of the storage bills were paid by Seminole Boat Company's own checks (Exh. H-1-8, offered R. 491-8).

Pilkington testified to nothing that connects Phipps with the ordinary operation of the boat or her maintenance. In all his correspondence concerning the *Seminole* he never addressed a letter to Phipps nor did he receive one from Phipps.* Simmon, not Phipps, introduced Huff, who had charge of the *Seminole* briefly (Exh. 38, R. Vol. VI, p. 1). Huff himself, not Phipps, announced his withdrawal (Exh. 39, R. Vol. VI, p. 1). Riley, not Phipps, agreed to the continuance of the $75 monthly storage rate in January, 1932 (Exh. 55, R. Vol. VI, p. 4). Riley, not Phipps, made inquiry as to the labor charge in the bill for storage in April, 1932 (Exh. 41, R. Vol. VI, p. 4). Riley, not Phipps,

* We have not overlooked Exhibit 45 (R. Vol. VI, p. 10). Phipps did not write this letter and his typewritten signature was an oversight (R. 1407-8, 1893).

acknowledged the $5 per month reduction in March, 1933 (Exh. 56, R. Vol. VI, p. 7). Riley, not Phipps, acknowledged the reduction to $50 per month in May, 1933 (Exh. 57, R. Vol. VI, p. 9). Hawkins, not Phipps, signed the letter of March 20, 1934, directing Pilkington to deliver the *Seminole* to Captain Baker (Exh. 46, R. Vol. VI, p. 10). Riley, not Phipps, authorized Pilkington to allow "the bearer" to board the *Seminole* and to complete her lay-up in May, 1934 (Exh. 47, R. Vol. VI, p. 10). Riley, not Phipps, authorized Pilkington to allow Able access to the *Seminole* for repair work in September, 1934 (Exh. 48, R. Vol. VI, p. 11). Hawkins, under the signature of Seminole Boat Company, not Phipps, authorized Pilkington to deliver the *Seminole* to Baker in February, 1935 (Exh. F, R. Vol. VI, p. 12). Riley, not Phipps, authorized Pilkington to allow Randell to board the *Seminole* and remove certain bedding in July, 1935 (Exh. 54, R. Vol. VI, p. 12). Hawkins, under the signature of Seminole Boat Company, not Phipps, authorized Pilkington to allow "the bearer" to board the *Seminole* and remove certain linen and silver in April, 1935 (Exh. 52, R. Vol. VI, p. 13). Webber, under the typewritten signature of Seminole Boat Company, not Phipps, sent Pilkington the keys to the *Seminole* in April, 1935 (Exh. 54, R. Vol. VI, p. 13). Riley, not Phipps, authorized Pilkington to allow Abel to remove some equipment from the *Seminole* in June, 1935 (Exh. 60, R. Vol. VI, p. 14). Finally, Riley, not Phipps, authorized Pilkington to allow Baker to remove the wreck of the *Seminole* from Pilkington's custody in September, 1935 (Exh. 62, R. Vol. VI, p. 16).

Phipps made only three visits to Pilkington's, two with Riley and one with Mrs. Phipps. On the visit with Mrs. Phipps there was no discussion with Pilkington concern-

ing the *Seminole* (R. 430, 1897). On the first visit with Riley, Phipps had no conversation concerning the *Seminole*. He inspected the *Seminole* casually and made only one suggestion, viz., that the radio be repaired. Phipps' second visit with Riley was in 1934. He went to see the *Iolanthe* which he owned. Riley talked with Pilkington concerning storage rates on the *Seminole*. As that talk was being concluded Phipps came up and told Pilkington that "we" could not afford to pay high rates for storage and that if the rates were raised Riley planned to remove the boats and store them elsewhere (R. 1507-9, 1597-1600, 1643-4, 1897-8, 1927-8).

Phipps interested himself in the storage rates on only one other occasion. On the bill for storage charges for the *Iolanthe* dated August 31, 1932, he wrote a note to Riley asking him to see if he could get a reduction of the rate for both the *Iolanthe* and the *Seminole*. The bill has no reference to the *Seminole* but Phipps felt that "they had overcharged *me* on the *Iolanthe*, and I thought he was overcharging *the company* on the *Seminole*" (R. 1567-8, 1608, 1926-7).

Phipps' participation in the daily affairs of the company

It is perfectly clear from the testimony of the officers of the company that they, uncontrolled by Phipps, handled the daily affairs of the company (R. 1277-8, 1281-2, 1351-2, 1471-3, 1479-81, 1484, 1503-5, 1885).

Phipps never approved or paid a bill for storage of the *Seminole* (Exh. 75, offered R. 1536). Hawkins, not Phipps, decided to pay the Florida property tax on the *Seminole* in February, 1935, and did so. Hawkins, not Phipps, decided to put the *Seminole* in commission in March, 1935,

and bring her to Miami and attempt to charter her. The Court so found (R. 3584). Hawkins, not Phipps, hired Baker, fixed the rate of his pay, and wrote Pilkington authorizing him to deliver the *Seminole* to Baker—he signed this letter "Seminole Boat Company by Roy H. Hawkins". Hawkins, not Phipps, approved the bill for the wages and expenses of the men to put her in commission (R. 1282-3, 1322-8, 1373; Exh. F, R. Vol. VI, p. 12; Exhs. GG, HH and II, offered R. 1324-8).

Upon the *Seminole's* arrival at Miami Hawkins, not Phipps, decided to berth her at the Royal Palm Dock. Hawkins, not Phipps, arranged to put a "For charter" sign on her, consulted with the brokers, decided to have her surveyed, selected Bernard from among the surveyors available, decided to insure her and made the necessary arrangements, agreed upon the prices for these services, and approved the bills for payment (R. 1282-96, 1330-2, 1336-8, 1372; Exh. NN, offered R. 1332, Exhs. UU, VV, WW, offered R. 1337-8).

Hawkins, not Phipps, approved the purchase of previsions for the crew in March, decided that the radio should be repaired and approved the bill for the work, approved for payment the bill for gasoline and kerosene, approved a bill for engine parts purchased for the *Seminole* and a further bill for crew's wages and expenses (R. 1327-31; Exhs. JJ, KK, LL and MM, offered R. 1328-31).

Hawkins, not Phipps, decided to send the *Seminole* to a boat yard to be hauled out for bottom cleaning and painting, decided to have certain chromium plating done and approved the bill for the work, decided to have certain cushions and mattresses repaired and approved the bill for the work, decided upon the purchase of certain screens and

decided to make certain repairs to the ventilator stack (R. 1286-7, 1332-40; Exhs. OO, QQ, RR, SS, TT and YY, offered R. 1332-40).

Hawkins, not Phipps, decided upon the purchase of various items of hardware, pipe fixtures, paint, fishing gear, etc., decided to install a condenser on the radio to eliminate static, and decided to have two Delco armatures repaired. Hawkins, not Phipps, decided to purchase gasoline from the Bay Supply Company rather than from another supplier, and approved for payment the bills for all the foregoing items (R. 1338-44, 1388; Exhs. XX, ZZ, 3-A, 3-B, 3-C, 3-D, 3-E, 3-F, offered R. 1339-44).

After the April cruise Hawkins, not Phipps, decided to return the *Seminole* to storage at Pilkington's and he, not Phipps, issued appropriate instructions to Captain Baker (R. 1304-5, 1890, 1974-5).

After the *Seminole* was stored at Pilkington's Riley, not Phipps, sent a man to remove the bedding. Hawkins, not Phipps, sent men to remove the silver—his letter authorizing Pilkington to allow them to do so was signed in the name of Seminole Boat Company. Webber, not Phipps, sent Pilkington the keys—his letter was signed in the name of Seminole Boat Company. Riley, not Phipps, approved and paid the storage bills for April and May and had the negotiations concerning the rate. Finally Riley, not Phipps, sent Abel to inspect the *Seminole* on the day of the fire (R. 680-1, 1109-12, 1305, 1537-9, 1557-8, 1636; Exh. 52, R. Vol. VI, p. 13; Exh. 53, R. Vol. VI, p. 12; Exh. 54, R. Vol. VI, p. 13; Exh. 55, R. Vol. VI, p. 4, offered R. 1536).

The master and engineer, Baker and Schlappi respectively, were not hired by Phipps and received no instructions from Phipps (R. 1759, 1973-5).

Authorities

The Circuit Court of Appeals held that "the basic dispute turns upon the ultimate facts" (R. 3648). We have shown, *supra*, pp. 6-8, that the Courts below concurrently found that none of the reasons justifying the disregard of the corporate form are present here. We have reviewed the evidence, *supra* pp. 10-32, to satisfy this Court that there is ample basis for those concurrent findings.

We do not deny that a stockholder may so dominate a corporation that it becomes his instrument for whose torts he is liable. Under the authorities, to justify that result the stockholder's domination must be out of character as stockholder, for some purpose of his own as distinguished from a proper corporate purpose, and must cause the wrong complained of.

In two recent cases this Court has referred to the instrumentality rule. In *Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307, this Court spoke of it as

"but a convenient way of designating the application in particular circumstances of the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when so to do would work fraud or injustice" (p. 322).

In *Pepper* v. *Litton*, 308 U. S. 295, flagrant fraud was involved. This Court said that "a sufficient consideration [for the disregard of the corporate entity] may be simply the violation of rules of fair play and good conscience by the" dominating person (p. 310), and held that the power of stockholders

"is at all times subject to the equitable limitation that it may not be exercised for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of

the *cestuis*. Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation" (p. 311).

In *United States* v. *Reading Company*, 253 U. S. 26, this Court said that the real issue is whether or not ownership of the subsidiary

"is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality or department of another company" (pp. 62-3).

Compare Powell on *Parent and Subsidiary Corporations*, pages 1-2, 40-2; Ballantine on *Parent and Subsidiary Corporations*, 14 California Law Review, 12-21; Wormser on *The Disregard of the Corporate Fiction and Allied Corporate Problems*, pages 54-9, 84, and see *Pullman Car Co.* v. *Missouri Pacific Co.*, 115 U. S. 587; *Peterson* v. *Chicago Rock Island & Pacific Ry. Co.*, 205 U. S. 364; *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U. S. 333; *Greenbaum* v. *Lehrenkrauss Corporation*, 73 F. (2d) 285 (C. C. A. 2); *Stone* v. *Cleveland C. C. & St. L. Ry. Co.*, 202 N. Y. 352; *Berkey* v. *Third Avenue Railway Co.*, 244 N. Y. 84; *Lowendahl* v. *Baltimore & O. R. Co.*, 247 A. D. 144, aff'd 272 N. Y. 360; *American Cyanamid Co.* v. *Wilson & Toomer Fertilizer Co.*, 51 F. (2d) 665 (C. C. A. 5); *In re Watertown Paper Co.*, 169 Fed. 252 (C. C. A. 2); *Werner* v. *Hearst*, 177 N. Y. 63; *Flenkrieg* v. *Siebrecht*, 238 N. Y. 254.

See also *McLean* v. *Goodyear Tire & Rubber Co., Inc.*, 85 F. (2d) 150 (C. C. A. 5), cert. denied 299 U. S. 600; *Atchison etc. Ry. Co.* v. *Cochran*, 43 Kans. 225, and *Bethlehem Steel Co.* v. *Raymond Concrete Pile Co.*, 141 Md. 67. These were tort cases and the attempt was made to hold the parent for the subsidiaries' torts but the Courts refused.

In *Insulation from Liability through Subsidiary Corporations*, 39 Yale Law Journal, 193, Douglas and Shanks analyzed many of the cases and demonstrated their inapplicability here. The authors say "the statement that the insulation will be broken down when the subsidiary is an 'agent', 'adjunct', 'instrumentality', 'alter ego', 'tool', 'corporate double', or 'dummy' of the parent is not helpful" (p. 195).

They enumerated four standards to be broken down before the corporate entity will be disregarded (pp. 196-7). None of them has broken down here.

Seminole Boat Company was sufficiently financed to meet normal strains. Petitioners' claims do not arise out of any normal strain. The financial backers of such an enterprise as this cannot fairly be required to finance it so largely that it could pay the tremendous losses resulting from this catastrophic fire upon pain of the disregard of the corporate entity. Any such requirement would emasculate one of the legitimate and fundamental purposes of incorporation.

The day to day business of the Seminole Boat Company was handled by the officers, *as officers of the corporation*, not by respondent.

Phipps did not pass over the threshold of the "formal barriers" and made no attempt to do so.

There was no misrepresentation. Pilkington attempted to deny that he knew of the existence of the Seminole Boat Company but was shown to have received Seminole Boat Company checks in payment of his charges, to have corresponded with the Seminole Boat Company and to have delivered up the vessel and allowed persons to go aboard her upon the authority of letters signed by the Seminole Boat Company, *supra*, pp. 28-30. There is no suggestion

in the record that petitioners were in any way misled as to the true ownership or control of the *Seminole*.

There is no substantial dispute between petitioners and respondent as to the law. The propositions petitioners seek to establish are these:

"In tort cases the test is, was the corporation in fact an entity? Was it sufficiently independent of its shareholders and sufficiently free of their dominance and control to be regarded as more than a mere agent of the shareholders?

* * * * * *

"That the corporate form does not effectively protect shareholders from tort liability when the corporation has no real independence, and the corporation is a mere name, is well established. * * *" (Petitioners' Brief, p. 28).

We have no quarrel with these propositions or with the decisions cited to support them. The cases where the corporate entity has been disregarded are, however, so far afield on the facts as to bear no resemblance to the problem presented here. The railroad cases are one illustration. Petitioners cite *Davis* v. *Alexander*, 269 U. S. 114, a case "where one railroad company actually controls another *and operates both as a single system*" (p. 117; italics ours); *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minneapolis Civic Ass'n*, 247 U. S. 490, a case where two railroad companies took over and operated a third as a "completely controlled agency" of certain terminal delivery tracks as an adjunct of their own businesses; *The Willem Van Driel, Sr.*, 252 Fed. 35 (C. C. A. 4), where the railroad company acquired a 999-year lease of the property and franchises of the corporation owning the grain elevators which the Court held "were constructed and operated merely as a facility to the business of the railroad company" (p. 39).

In *Consolidated Rock Co.* v. *DuBois*, 312 U. S. 510, *The Willem Van Driel, Sr.* and other cases relied upon by petitioners are cited only for this proposition:

"It is well settled that where a holding company directly intervenes in the management of its subsidiaries so as to treat them as mere departments of its own enterprise, it is responsible for the obligations of those subsidiaries incurred or arising during this management" (p. 524).

We do not dispute this proposition and petitioners' authorities establish nothing more. This proposition is not applicable here because the *Seminole* was no department of any business of Phipps and he did not intervene in her management.

Southern Pacific Co. v. *Lowe*, 247 U. S. 330; *Lehigh Valley R. R. Co.* v. *Delachesa*, 145 Fed. 617 (C. C. A. 2); *Lehigh Valley R. R. Co.* v. *DuPont*, 128 Fed. 840 (C. C. A. 2); *Ross* v. *Pennsylvania R. Co.*, 148 Atl. 741, and *Specht* v. *Missouri Pacific R. R. Co.*, 154 Minn. 314, are all railroad cases.

The distinction between these several cases and the case at bar must be obvious. In all of them the parent was engaged in the railroad business and saw fit to operate a subordinate part of its own business through a subsidiary. The business of the subsidiary was but a fraction of the homogeneous whole which was the parent's business. Here, however, Phipps was not in any business, least of all in the business of operating boats for hire, which was the business of the Seminole Boat Company. Moreover, the persons who performed the daily work of operating and maintaining the *Seminole* did not do so as agents of, or in connection with, a larger or similar enterprise of Phipps of which the operation of the *Seminole* was a part because there was no such similar or larger enterprise operated for Phipps.

Joseph R. Foard Co. v. *Maryland*, 219 Fed. 827 (C. C. A. 4), is distinguishable on the same ground. The parent attempted to escape liability by incorporating separately a subsidiary which the Court held "was in reality but a department of the business" (p. 829).

Luckenbach SS. Co. v. *W. R. Grace & Co. Inc.*, 267 Fed. 676 (C. C. A. 4), and *The J. B. Austin, Jr.*, 1 F. (2d) 451, applied to the shipping industry the doctrine applicable to the railroad industry. In the *Luckenbach* case the parent wholly owned the subsidiary and operated the subsidiary's vessel as a unit of its larger fleet. There was no question of tort liability. In the *Austin* case five barges were operated as units of the parent's business, although title was in two subsidiaries. The Court merely held that the relationship between the parent and the barges was such that a dealer who supplied coal to the barges upon the order of the parent acquired a maritime lien.

The Centaurus, 291 Fed. 751 (C. C. A. 4), merely holds that a corporation which purports to be the agent of a ship owner, but which "was in fact the owner itself" (p. 753), may not acquire a lien against its own vessel and so obtain priority over *bona fide* third party claims.

Gulf Oil Corporation v. *Lewellyn*, 248 U. S. 71, involved a parent and subsidiary which the Court held "constituted a single enterprise" (p. 72) and applied the doctrine of the railroad cases to the oil industry.

Petitioners cite six cases where the dominating parent was held for its corporation's tort, but in each of these the domination was so out of character as stockholder, so foreign to proper parental influence, and so directly affected the tort involved, that the decisions furnish no guide in the state of facts in the instant case.

In *Costan* v. *Manila Electric Company*, 24 F. (2d) 383 (C. C. A. 2), the parent, disregarding its subsidiary's corporate existence, appointed its own management of the property of the subsidiary, authorized its manager to "hire operating employees on its behalf, to fix their salaries, and to discharge them, and to purchase labor, materials and supplies, in its name and on its behalf" (p. 384).

In *Mangan* v. *Terminal Trans. System Inc.*, 157 Misc. 627, aff'd 247 A. D. 853, the parent, by contract, undertook to provide taxicab service at various terminals. As the Court said "that was its business" (p. 630). It conducted "its business" through subsidiaries, one of whose cabs was negligent. The Court held the parent on the familiar agency doctrine that the principal is liable for the torts of its agents committed while employed on the principal's business.

In *Oriental Investing Co.* v. *Barclay*, 25 Tex. Civ. App. 543, the parent holding corporation organized a subsidiary to operate a hotel which it continued to own. Before doing so the parent itself hired as its employees the persons who were injured by a falling elevator. Those persons never knew of the formation of the subsidiary. The basis of the decision is that the employer remained liable for the injuries of *its* employees sustained on *its* property.

In *Dixie Coal Min. & Mfg. Co.* v. *Williams*, 128 So. (Ala.) 799, the corporation was disregarded because it had never had any assets and had but one stockholder who operated the corporate business personally "just as he would his private business" (p. 799).

In *Auglaize Box Board Co.* v. *Hinton*, 100 Ohio St. 505, the subsidiary became insolvent and the parent took over the factory which was "being operated solely by the Strawboard Company" (the parent) when plaintiff sustained her

injuries (p. 509). At that time "The Bloomer Brothers Company (the subsidiary) had in fact ceased to exist" (p. 510). As Douglas and Shanks say in *Insulation From Liability Through Subsidiary Corporations* (Vol. 39, Yale Law Journal, 193, 201) "few cases present such a clear case of complete domination".

In *Erickson* v. *Minnesota & Ontario Power Co.*, 134 Minn. 209, the parent owned the land on which its wholly owned subsidiary erected a dam under contract with the parent. The terms of the contract made the subsidiary the parent's agent and the Court held nothing more.

In several of the cases cited there was no question of disregard of the corporate entity. *Wooford* v. *Wooford*, 176 So. 499, was a dispute between stockholders who owned all the outstanding shares. They disagreed as to the management of the corporate property and the proceeding was brought for an accounting and a division; substantially a proceeding for the dissolution of the corporation. No third party rights were involved and there was no claim against the corporation.

In *Callas* v. *Independent Taxi Ass'n*, 66 F. (2d) 192 (C. C. A. D. C.), cert. denied 290 U. S. 669, there was no question of parent and subsidiary, or domination.

In re Great Lakes Transit Corporation, 81 F. (2d) 441 (C. C. A. 6), involved no disregard of corporate entity. Playfair, not the corporation, was held to be in fact the owner of the vessel (p. 442).

In *The Silver Palm*, 94 F. (2d) 776 (C. C. A. 9), the petitioner for limitation of liability pleaded in its petition that it was "owner and operator" of the vessel. However, after liability had been imposed, it sought to establish that another corporation was the operator. One Thompson was

the manager both of petitioner and the corporation which the petitioner belatedly claimed was the operator. The Court held only that his knowledge, whether gained as manager of one company or the other, constituted privity of the owner under the limitation statute. No corporate entity was disregarded.

The cases concerning corporations formed for the purpose of evading the law have no bearing here. It is not denied that Seminole Boat Company was formed for the legitimate purpose of putting the *Seminole* in the public chartering business. *United States* v. *Reading Company*, 253 U. S. 26; *United States* v. *Lehigh Valley R. R. Co.*, 220 U. S. 257; *McCaskill* v. *United States*, 216 U. S. 504; *Linn Timber Co.* v. *United States*, 236 U. S. 574; *Gregory* v. *Helvering*, 293 U. S. 465; *Corker* v. *Soper*, 53 F. (2d) 190 (C. C. A. 5), cert. denied 285 U. S. 540; *Harris Inv. Co.* v. *Hood*, 167 So. 25.

The cases where corporate assets have been transferred in fraud of creditors, or for the personal advantage of stockholders to the detriment of the corporation, are of no assistance here because there is neither claim nor proof of any such transaction. *Biscayne Realty & Ins. Co.* v. *Ostend Realty Company*, 109 Fla. 1; 8; *Miakka Estates, Inc.* v. *B. L. E. Realty Corp.*, 132 Fla. 307; *Hirsch* v. *Lincoln Securities Co.*, 118 Fla. 164; *Mayer* v. *Eastwood-Smith Co.*, 122 Fla. 34; *Fickling Properties, Inc.* v. *Smith*, 123 Fla. 556; *Bellaire Securities Corp.* v. *Brown*, 124 Fla. 47.

Weisser v. *Mursam Shoe Corp.*, 127 F. (2d) 344 (C. C. A. 2), is distinguishable on similar grounds. The stockholders represented to their corporation's lessor that the corporation's liabilities were in fact their obligations (p. 349).

Third Avenue Company v. *Keely*, 111 Fla. 46, is cited for the apparent purpose of leading the Court to infer that the Phipps family customarily employ the corporate form to perpetrate fraud. There is no justification for this insinuation. The Court dealt with the allegations of a bill and not with evidence. The case was never tried and the allegations never proved. The Court said "whether the allegations of the bill can be proved by complainant is another matter, • • •" (p. 51).

II. Respondent, if liable, is entitled to limitation of liability.

Only if Seminole Boat Company is disregarded does the limitation question arise. If it be disregarded, Phipps must be considered as one of two individual co-owners of the *Seminole*. In *Flink* v. *Paladini*, 279 U. S. 59, this Court held that a stockholder of a corporate vessel owner, who was liable under the California statute for the corporation's tort, is entitled to limitation of liability as an owner within the meaning of the limitation statutes.

This Court has often said that the limitation statutes should be construed liberally. In *Larson* v. *Northland Transportation Co.*, 292 U. S. 20, this Court said:

"Statutory provisions for limitation of liability should be construed liberally in order to effectuate their beneficent purposes. Providence & N. Y. S.S. Co. v. Hill Mfg. Co., 109 U. S. 578, 588; Butler v. Boston & Savannah S.S. Co., 130 U. S. 527, 549, 550; LaBourgogne, 210 U. S. 95, 121; Capitol Transportation Co. v. Cambria Steel Co., 249 U. S. 334; Evansville & B. G. Packet Co. v. Chero Cola Bottling Co., 271 U. S. 19, 21; Hartford Accident & Ind. Co. v. Southern Pacific Co., 273 U. S. 207, 214; Flink v. Paladini, 279 U. S. 59" (p. 24).

The statute* conditions the grant of limited liability upon the absence of privity or knowledge of the cause of the loss. Whether one has privity or knowledge is a question of fact. Both Courts below found that respondent Phipps had neither privity nor knowledge (this brief, p. 9). That they are right we shall show under the next heading.

Petitioners' losses were occasioned without the privity or knowledge of respondent Phipps

Petitioners do not claim that Phipps had knowledge of the cause of petitioners' losses. The cause of the losses, according to petitioners, was a defective gasoline tank or tanks, resulting in the leakage of gasoline. However, in March, 1935, the *Seminole* had been surveyed and passed by a competent surveyor, and she had operated on the cruise during that year without any sign of leak (*supra*, p. 4). Respondent Phipps left the *Seminole* on the cruise ten weeks before the fire and never saw her again. Thereafter she was in the possession of a bailee (Pilkington) hired to store, inspect and care for her. Pilkington inspected her almost every other day. He examined her five days before the fire and found no defect (R. 462, 520).

Notwithstanding petitioners' contention, there is no direct evidence that the tanks leaked. The Courts below inferred that there was gasoline in the engine room from the fact of the explosion. This inference led them to infer that the tanks must have leaked. There is no justification for this second inference because the tank valves were found open after the fire, although they had been left shut tight

*The statutes in effect at the time of the fire are set forth in Appendix A.

when the *Seminole* was delivered to Pilkington, as found by the lower Courts (R. 3586, 3647). These open valves account for the presence of any gasoline that was in the engine room, and, therefore, the inferred presence of gasoline does not justify an inference that the tanks leaked. The cause of the loss, therefore, was the act of some unidentified person in opening the valves and leaving them open during the time the *Seminole* was in Pilkington's possession. The question presented, therefore, is whether or not respondent Phipps had privity or knowledge of the open valves. The answer to this question must be in the negative—Phipps left the vessel at Lower Matecumbe ten weeks before, and the vessel proceeded to Pilkington's under her own power. She was thereafter prepared for storage by her crew, and Phipps was not present and had nothing whatever to do with preparing her for storage or closing the valves. The Circuit Court of Appeals found that when the crew left her with Pilkington the valves were closed (R. 3647). That the valves were opened after the *Seminole* was delivered into the custody of Pilkington, bailee, is clear. Pilkington admitted that he had tried to run the generator, which necessarily involved opening the valves to obtain gasoline to run the generator motor (R. 1100-1, 1113-14, 1310-11, 1545-7, Finding 10, R. 3586). Accordingly Pilkington, bailee in possession, should have been held liable because the valves were opened while the vessel was in his custody. *Pan American Petroleum Transport. Co.* v. *Robins Dry Dock & Repair Co.*, 281 Fed. 97 (C. C. A. 2); cert. denied, 259 U. S. 586.

Assuming, however, that the tanks were defective and leaked, respondent had no privity or knowledge of this. Petitioners do not even claim that he had knowledge of

any defective condition, but claim that he might have known if proper inspections were made. The Circuit Court of Appeals found that proper inspections were made, saying:

"It is undisputed that the vessel had been examined and pronounced fit by an experienced ship surveyor in February, 1935; that she developed no flaws during the cruise or prior to reaching Pilkington's; that the crew left her gasoline valves closed, her electric switches open, her gas tanks registering empty, and her bilges clean and free of gasoline or gasoline vapor; and she was repeatedly examined by competent men between April 15 and June 24, 1935, who discovered nothing wrong with her" (R. 3647).*

The evidence supporting the above finding will be discussed under the next heading.

It is well settled that an owner may not be charged with privity or knowledge and may limit his liability when he has delegated the duty of inspection to a competent subordinate and is ignorant of any negligent neglect of duty by that subordinate. See authorities, *infra*, pages 52-60.

The inspections of the *Seminole* were proper and timely and did not disclose any defect

Petitioners complain because the tanks could not be visually examined without tearing out a bulkhead. However, it was not necessary to examine the tanks visually. It was a simple matter to test them hydrostatically (R. 2288, 2593-5).

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* The District Court came to the same conclusion, saying:

"Respondent Phipps was without privity or knowledge of the events that led up to and brought about the explosion and fire, and if corporate liability be disregarded, which in my opinion should not be, Phipps would be entitled to limit his liability to the value of his interest in the wreck of the *Seminole* after the fire under the limitation of liability statutes" (R. 3582).

There were two systems of inspection, both of which petitioners ignore. Captain Baker inspected the *Seminole* and matters of upkeep and repairs were in his charge. He had thirty-five years' experience and his ownership and operation of his own charter boat establish his competence as fully set forth in the record (R. 1968, 1983, 2023-4, 2044-7). Although Captain Baker was not continuously employed on the *Seminole*, during the lay-up periods he, as her master, visited her and made frequent inspections. He testified:

"I was master of the *Seminole*. * * * I would go up and look around. * * * That was my business, you know. * * * I would go over the boat and clean it out, and would go over and look the boat over; that was the nature of my ordinary duties. * * * As far as the working parts of the boat was concerned, I was in charge. * * *" (R. 2045).

Such a system of inspection by the master is sufficient. See *California Yacht Club* v. *Johnson*, 65 F. (2d) 245 (C. C. A. 9).

In addition to inspections by Captain Baker, while the *Seminole* was in storage at Pilkington's she was inspected by Pilkington, bailee in possession, who had long experience as custodian of laid-up vessels. He admitted that he inspected the *Seminole* five days before the fire and everything was in good shape. As he* testified, he "had gone on the boat, all through it, on Wednesday (five days) before the fire and I didn't smell nothing and everything was in good shape" (R. 462, 520).

It was Pilkington's duty as bailee in possession to inspect the *Seminole*. The Court below so found (R. 3588). Pilkington admitted that his contract of storage with all the boat owners was the same and that he inspected all

* Pilkington was petitioners' witness (R. 419).

the boats in storage (R. 516-17). Petitioners' testimony confirmed this—the president of one of the petitioners testified that Pilkington contracted to inspect the boats (R. 746-7), and one of the boat captains (petitioners' witness) testified that Pilkington undertook to inspect the boats (R. 319).

Bernard, a marine surveyor of wide experience, also inspected the *Seminole* in March, 1935 (R. 2205). He was on board the *Seminole* parts of two days and possibly a third to examine the *Seminole* "as to her fitness" (R. 2211). He made a "close internal examination of the hull and the parts", went through the bilges and "found them clean and free from gas and any element that might indicate there was any weakness or gases that might be detrimental in the use of the boat" (R. 2213). He looked for gas leaks that might exist and found none (R. 2215). He found the tanks heavily constructed, well bedded and secured to place and "there were no leaks" (R. 2216-17); all Government requirements had been fully complied with (R. 2218). He made a search for odor or leak of gasoline from the tanks (R. 2230) and testified

"what I did, to prove those tanks were not leaking, was to see there was no evidence of gasoline odor or a drip or drain in the bilge; that's why I followed the bilge",

and there was "no leak, no; the tanks were tight" (R. 2249).

Elliott Bryant, one of petitioners' witnesses, testified that he accompanied Bernard "through all of the bilges" and that the bilges were "the cleanest bilges I found on any boat" (R. 414, 418).

Bernard could not examine the entire surface of the four tanks because they were in a separate compartment. The District Court held that this was proper construction (R.

3587). The tanks rested in pans which would catch any leak, and whether they were leaking could be determined by looking into the pans (R. 634), which could be seen through the holes in the bulkhead through which the tank valves protruded. These holes are shown on photographs, Exhibits 3, 4 and 5 (offered R. 141-2).

Petitioners argue that Bernard did not make a complete survey. He did not make what is called a "condition" survey, i.e., such as underwriters require to admit vessels to classification.* It is clear, however, as he testified, that he made a "thorough examination" (R. 2256-7). The report of his survey, Exhibit DD, is printed in full, R. Vol. VI, pp. 22-6. Petitioners comment that Bernard was paid only $17.50. Bernard wanted to explain the amount of his charge but petitioners' counsel would not permit him to do so (R. 2238).

Petitioners blandly assume that inspection prior to the fire would have shown that the tanks leaked. As we have pointed out, *supra*, pp. 43-4, the conclusion that the tanks leaked is based upon inference upon inference. Pressure tests *after the fire* disclosed no leaks where the tanks had not been burned by fire. The seams of the tanks had been soldered. On the upper parts of the tanks the solder melted off during the fire, but at the lower ends the tanks were buried in debris before the fire reached them and the solder remained. Exhibit 139, a photograph, shows solder remaining on one of the side seams of one of the tanks, and Exhibits 5-X, 5-Y, 5-Z and 6-A, segments of the bottom sections of each of the four tanks, show the solder still remaining there. After the fire the tanks were filled with

* The *Seminole* was not classed and no "condition" survey was required (R. 2236-8).

water and subjected to a pressure of five pounds per square inch, more pressure than existed within the tanks when they were full of gasoline. They did not show any leak at the lower ends, where the solder had not been burned away (R. 890, 3172-7, 3431-2). As a witness called by petitioners testified:

"Q. Did you notice any leaks around the bottom seams of any of those tanks? A. No, I didn't notice any leaks around the bottom at all" (R. 3175).

"Q. Did you observe any leaks where there was solder up the side seams? A. No" (R. 3176).

It is unreasonable even to attempt to charge respondent with knowledge which petitioners say might have been gained by tests *before* the fire when the tests *after* the fire showed no leaks except where the solder had been burned away by the fire.

The District Court, having held that Pilkington was obliged to inspect, continued:

"he may be criticized for not having detected and avoided the gaseous fumes on the *Seminole*, but I do not find that his dereliction in that regard was sufficient on which to base liability" (R. 3588).

If an inspection by Pilkington five days before the fire failed to disclose the gaseous vapor, and Pilkington's inspection was made with ordinary care so that he was not liable, how can respondent be held for failing to make an inspection since an inspection made with due care would have disclosed no dangerous condition? See *Restatement of the Law of Torts*, Vol. 2, §300, p. 807.

The authorities cited by petitioners deal with fact situations so different from those in the instant case that they have no bearing here. Petitioners seek to apply to a vessel

laid up in dead storage, in the possession of a competent bailee charged with the duty of inspecting and caring for the vessel, the rules of law applicable to an owner in possession of a vessel in active operation.

The Malcolm Baxter, Jr., 20 F. (2d) 304 (C. C. A. 2), aff'd 277 U. S. 323, involved a schooner purchased by new owners after she had commenced loading for the voyage in question. No officer of the owner inspected her before the voyage, nor was she drydocked, nor subjected to an extensive survey. Liability was decreed and limitation denied because the vessel was structurally unseaworthy due to a "hog" in her keel, which could have been discovered by the exercise of due diligence, i. e., the shipowner did not bring itself within the provisions of the Harter Act, 277 U. S. at p. 331. That decision has no application here. It involved a vessel in actual commercial operation. The vessel's seaworthiness was warranted by the shipowner and there was a breach of that warranty.

The Friendship II, 113 F. (2d) 105, reversed *sub nomine Just* v. *Chambers*, 312 U. S. 383, involved actual knowledge. Petitioner's own sons had been overcome by carbon monoxide gas in the same stateroom where petitioner put his guests.

Chesapeake Lighterage and Towing Co., Inc. v. *Baltimore Copper, Smelting and Rolling Co.*, 40 F. (2d) 394 (C. C. A. 4); *In re P. Sanford Ross*, 204 Fed. 248 (C. C. A. 2), and *The Republic*, 61 Fed. 109 (C. C. A. 2), are all cases where the vessels were in active service.

The Loyal, 204 Fed. 930 (C. C. A. 2); *Dexter-Carpenter Coal Co.* v. *New York, O. & W. Ry. Co.*, 50 F. (2d) 270, and *The Miami*, 43 F. (2d) 562, do not hold that an owner must inspect, periodically or otherwise, a vessel laid up out of

commission. Each of these cases involved unseaworthiness as to hull, i. e., inability to keep out the water as a result of which the vessels sank with loss of cargo.

Sabine Towing Co. v. *Brennan*, 72 F. (2d) 490 (C. C. A. 5), did not turn upon inspections or the lack of them. There, the tug owner sent its unstable tug to sea in violation of restrictions as to her draft with the knowledge of a managerial officer. The tug sank and became a total loss with her crew.

In re Jacobsen, 52 F. (2d) 179, is similar. There, the owner bought an abandoned vessel and ordered her to sea without making adequate arrangements for her reconstruction or her seaworthiness with full knowledge of the existence of a severe storm.

In *In re Jeremiah Smith & Sons, Inc.*, 193 Fed. 395 (C. C. A. 2), limitation was denied because a managerial officer of the corporate petitioner himself committed the negligent act which caused the explosion. There was no question of inspections or lack of them.

Gunnarson v. *Robert Jacob Inc.*, 94 F. (2d) 170 (C. C. A. 2), involved protane gas and did not deal with an owner's duty to inspect. Liability was decreed without limitation because the owner, with personal knowledge, placed the protane tank next to the galley stove and failed to instruct the decedent in the use of the dangerous gas.

New York & Cuba Mail S.S. Co. v. *Continental Ins. Co.*, 117 F. (2d) 404 (C. C. A. 2), cert. denied 313 U. S. 580, dealt with a fire on a vessel at sea. The sailors were not divided into equal watches as required by statute. The shipowner sought to limit its liability although its marine superintendent, a person of managerial status, failed to take any steps to ascertain whether the law was being complied with despite ready means of doing so.

In *The Argent*, 1940 A. M. C. 508, the *Argent* maintained an unlawful light for "about a year and a half" which eventually resulted in damage for which her owner was held. Limitation was denied because the owner had taken no steps whatever for that long period to ascertain whether or not lights were being exhibited in compliance with the law.

Asiatic Petroleum Co., Ltd. v. *Lennard's Carrying Co., Ltd.* (1914), 1 K. B. 419, arose under the English statute. While in a violent gale a boiler tube burst, depriving the vessel of steam, and she stranded, following which her benzine cargo leaked, resulting in a fire and her destruction. The ship was held unseaworthy as to her boilers and limitation was denied because the shipowner knew that the boilers were old, that they had been passed by surveyors only for a reduced pressure, and in June, 1911, "the boilers were then found to have various defects" (p. 438). The owners ordered new boilers for delivery in November but sent the vessel on the fatal voyage before the new boilers arrived.

Petitioners stop too soon in their quotation from *Benedict on Admiralty*, 5th Ed., § 498. Following the passage quoted (Petitioners' Brief, p. 36), the author says:

> "But if a proper person has been selected to perform such duties and has neglected them, *an individual owner unaware of the neglect and of the defective condition arising therefrom may limit his liability.* It is not, however, necessary that a shipowner, in order to limit his liability, should acquire expert knowledge concerning his vessel, her equipment and machinery, or should place between himself and the master an intermediary possessed of such knowledge" (p. 598; italics ours).

See also the author's remarks in the 6th Ed., 1940, Vol. III, at pp. 384-5.

Petitioners attack only a straw man in arguing that Scott, Hawkins, Alley and Riley were not competent to inspect the *Seminole*. These men were managers of the business of the Seminole Boat Company and were not intended, and did not attempt, to be the inspectors of the vessel from a practical standpoint. As we have pointed out above, Captain Baker was in charge of matters of maintenance, upkeep and repairs, and the *Seminole* was laid up in the possession of an experienced and competent yacht storage man (Pilkington). Pilkington had complete possession of the *Seminole* and his was the duty to inspect. Petitioners cite no authority for their contention that a bailor has a duty to inspect his property although not in his possession, laid up out of commission and in possession of a competent bailee who inspects.

Privity or knowledge must be actual and not merely constructive

Petitioners contend that privity must be imputed to Phipps because the officers of Seminole Boat Company might have discovered the allegedly defective condition of the tanks if they had made adequate inspections. This contention is based upon the argument that these men were Phipps' *alter ego*. On the contrary, an individual boat owner is liable only for his personal privity or knowledge. It is well settled that the knowledge of his agents cannot be imputed to him.

In *Richardson* v. *Harmon*, 222 U. S. 96, this Court said:

"In view of the manifest policy of Congress to further encourage the shipowning industry and the very broad terms employed in this last legislation; we can but infer that the policy of the Government was to confine the risk of an owner *not personally at fault* to his interest in the ship" (p. 104; italics ours).

In *The Republic*, 61 Fed. 109 (C. C. A. 2), the Court said:

"It was the intention of congress *to relieve shipowners from the consequences of all imputable culpability* by reason of the acts of their agents or servants, or of third persons, but not to curtail their responsibility for *their own* willful or negligent acts" (p. 112,; italics ours).

In *The 84-H*, 296 Fed. 427 (C. C. A. 2), cert. denied 264 U. S. 596, the Court said:

"This brings us to consider the meaning of the words 'privity and knowledge' as they are found in the act under consideration. The statute withholds the right to limit liability if the shipowner had 'privity or knowledge' of the fault which occasioned the damages to be recovered. The *privity or knowledge must be actual and not merely constructive. It involves a personal participation* of the owner in some fault or act of negligence causing or contributing to the injury suffered" (p. 431; italics ours).

In *The Princess Sophia*, 278 Fed. 180, aff'd 61 F. (2d) 339 (C. C. A. 9), cert. denied 288 U. S. 604, the Court said:

"Privity or knowledge, as used in the statute, imports *actual* knowledge causing or contributing to the loss or knowledge, or means of knowledge of a condition of things likely to produce or contribute to the loss without adopting proper means to prevent it" (p. 188; italics ours).

"It appears to be well settled that, where the owner in good faith appoints a competent agent to equip, man, or maintain a vessel or her machinery, any acts of omission or commission of the agents, *not participated in personally by the owner*, do not constitute privity or knowledge" (p. 189; italics ours).

In *Warnken* v. *Moody*, 22 F. (2d) 960 (C. C. A. 5), the Court said:

"It is plain that W. L. Moody, Jr. did not *personally* participate in that negligent conduct of his employee, and had no knowledge or information thereof until after the

deceased's death. It follows that the negligence or misconduct of the employee, Anderson, was 'without privity or knowledge' of the owner, W. L. Moody, Jr., within the meaning of the statute providing for the limitation of liability of owners of vessels" (p. 962; italics ours).

It is well settled that negligence alone is not privity or knowledge. In *LaBourgogne*, 210 U. S. 95, this Court said:

"Without seeking presently to define the exact scope of the words privity and knowledge, it is apparent from what has been said that it has been long since settled by this court that mere negligence, pure and simple, in and of itself does not necessarily establish the existence on the part of the owner of a vessel of privity and knowledge within the meaning of the statute" (p. 122).

Petitioners' argument (Point III) fails to distinguish between the privity rule as applied to individuals and corporations. As shown by the cases above, it is well settled that privity or knowledge of a shipowner must be personal and may not be imputed. In the case of an individual the question is whether he personally had privity or knowledge of the cause of the loss in question. On the other hand, inasmuch as a corporation has no physical being and necessarily acts through natural persons, who are its agents, the privity or knowledge of certain of these persons must be held to be the knowledge of the corporation. Otherwise a corporation would never have privity or knowledge and could always limit its liability. Numerous cases stemming from *Craig* v. *Continental Insurance Co.*, 141 U. S. 638, hold that where the owner is a corporation the privity or knowledge of an officer or agent having managerial status is the privity or knowledge of the corporation. See *Spencer Kellogg Co.* v. *Hicks*, 285 U. S. 502, where the "works manager" was held to be a person of managerial status, whose privity was held to be that of the corporate owner.

In a long line of cases involving individual as distinguished from corporate shipowners limitation has been granted although persons* entrusted by such individual owners with the management of the vessel had knowledge of, or were privy to, the negligent act causing the loss, the crux of the decisions being that privity or knowledge is not imputable. *The Yungay*, 58 F. (2d) 352, 355-6; *The Chehaw*, 54 F. (2d) 645; *Warnken* v. *Moody*, 22 F. (2d) 960 (C. C. A. 5); *Christopher* v. *Grueby*, 40 F. (2d) 8 (C. C. A. 1); *Successors De Esmoris & Co.* v. *Whitney & Bodden Slipping Co., Inc.*, 39 F. (2d) 191; *Petition of Liebler*, 19 F. Supp. 829; *The City of Camden*, 292 Fed. 93 (C. C. A. 3); *James McWilliams Towing Lines* v. *Shaw*, 288 Fed. 74; *Flynn* v. *Christenson*, 273 Fed. 385 (C. C. A. 9); *The Tommy*, 151 Fed. 570 (C. C. A. 2); *Quinlan* v. *Pew*, 56 Fed. 111, 118 (C. C. A. 1); *In re Leonard*, 14 Fed. 53.

In *The Silver Palm*, 94 F. (2d) 776 (C. C. A. 9) (Petitioners' Brief, p. 43), petitioner (owner) was a corporation and the agent referred to, charged with the managerial functions, was also a corporation. As the Court said:

"Against its allegation that it was the 'operator' of the vessel, petitioner attempted to establish that it had delegated its operation to another corporation, * * *" (p. 780).

The Court found that Silver Line, Ltd., owner and petitioner, was the operator of the vessel, and held that the petitioner did know of the reversing characteristics of the vessel's engine, which was the proximate cause of the collision. Petitioner had considered the installation of a brake device and had rejected it. With this knowledge

* Petitioners would call them alter egos.

before it, petitioner did not acquaint the master of the vessel with the reversing characteristics of the engine and at the time of the collision the master had no knowledge thereof. The case has nothing in common with the instant case.

The same Court discussed privity and knowledge in *The South Coast*, 71 F. (2d) 891. In that case it was claimed that a vessel was lost by reason of an explosion and that she was unseaworthy. The Court said:

"Even if unseaworthiness had been shown or could be presumed as the cause of the disaster, appellee would still be entitled to limit its liability, if such unseaworthiness was without privity or knowledge on its part. California Yacht Club v. Johnson (C. C. A. 9), 65 F. (2d) 245; The Princess Sophia (C. C. A. 9), 61 F. (2d) 339."

After discussing privity and knowledge, the Court said as to imputation of privity or knowledge as follows:

"We are unable to perceive how there can be imputation of privity or knowledge to a corporation of defects in one of its vessel's boilers, unless the defects were apparent, and of such a character as to be detected by the inspection of an unskilled person. The record fails to show that the defects were of this character. The testimony fairly sustains the finding of the court that the defects in the boiler were not patent, and that they could have been discovered only by applying the proper test after the repairs of June, 1893. The test was not applied, and in that omission is one of the elements of the negligence of the petitioners, as found by the court. When we consider the purpose of the law which is under consideration, and the construction that has been given to it by the courts, it is obvious that the managers of a corporation whose business is the navigation of vessels are not required to have the skill and knowledge which are demanded of the inspector of a boiler. It is sufficient if the corporation employ, in good faith, a competent person to make such inspection. When it has employed such a person in good faith, and has delegated to him that branch of its duty, its liability beyond the value of the vessel and freight ceases, so far as concern injuries

from defects of which it has no knowledge, and which are not apparent to the ordinary observer, but which require for their detection the skill of an expert" (pp. 894-5).

Compare also *The Princess Sophia*, 278 Fed. 180, aff'd 61 F. (2d) 339 (C. C. A. 9), *supra*, p. 54.

In re Great Lakes Transit Corporation, 81 F. (2d) 441 (C. C. A. 6) (Petitioners' Brief, p. 44), involved petitions by a corporation and an individual. The Court found that the individual, not the corporation, actually owned the vessel. Limitation of liability was denied because the vessel owner had personally contracted to supply a seaworthy vessel, a contractual obligation against which an owner may not limit his liability entirely apart from all considerations of privity or knowledge. See *Pendleton* v. *Benner Line*, 246 U. S. 353. The Court found also that

"The primary cause of the loss, the negligent failure properly to drain the sea cock, was also known to Playfair", the owner (p. 444).

In the *Great Lakes Transit Corporation* case the Court by way of dictum said that the knowledge need not be actual but may be imputed if someone in charge for the owner had general authority to act for him and by the exercise of ordinary care could have discovered the fault, overlooking the distinction in the application of the rule as between corporate and individual owners. The cases cited by the Court to support this dictum are all corporate owner cases (p. 444). The same Court cited this decision in *Interlake Iron Corporation* v. *Gartland S.S. Co.*, 121 F. (2d) 267 (C. C. A. 6) only for the proposition that

"* * * where the contract is personal there is a warranty of seaworthiness and lack of the owner's privity or knowledge will not permit of limitation. *In re Great Lakes Transit Corp.*, 6 Cir., 81 F. (2d) 441, and cases therein cited" (p. 270).

Also in *In re New York Dock Co.*, 61 F. (2d) 777 (C. C. A. 2), the Court overlooked the fact that the owner was an individual and applied the corporate rule, denying limitation of liability because of the negligence of the owner's superintendent. Only cases involving corporate owners were cited by the Court, and the distinction between individual and corporate owners was not considered (p. 779).

Where the question was later squarely raised in the Second Circuit the Court held unequivocally that privity or knowledge must be personal even where lack of adequate inspection is involved. In *Flat-Top Fuel Co. Inc.* v. *Martin*, 85 F. (2d) 39 (C. C. A. 2), cert. denied 299 U. S. 585, the vessel sank because inadequately inspected. The Court granted limitation to the individual owner, saying:

"Nevertheless, the respondent [individual vessel owner] is entitled to limitation of liability, which is equivalent to exoneration since the barge was a total loss and there was no pending freight. *The lack of due diligence which forfeits limitation must be personal to the owner.* The Galileo, 54 F. (2d) 913, 914 (C. C. A. 2), affirmed Earle & Stoddart v. Ellerman's Wilson Line, 287 U. S. 420, 425. The evidence negatives any negligence on the part of Martin himself. He did not undertake, himself, to determine the condition of the barge, but employed a competent master to look after her and to inform him of any needed repairs; and he was ready and able to make any repairs required" (p. 42; italics ours).

This case was again referred to in the same Circuit—see *The Ariel*, 33 F. Supp. 573, affirmed 119 F. (2d) 866 (C. C. A. 2), where the Court granted limitation despite alleged structural defects, saying:

"Certainly the unseaworthiness of the vessel, alleged to stem from the condition of the pilot house or bulkhead door, was not so obvious as to meet the eye of Wilkisson on his occasional visits to the vessel at the dock. Therefore *In re New York Dock Co.*, 61 F. (2d) 777, *Christopher* v.

Grueby, 40 F. (2d) 8, and *In re Great Lakes Transit Corp.*, 81 F. (2d) 441, relied upon by the claimants are not applicable" (p. 576).

Under another section of the limitation statute this Court, in a leading case, held that imputed negligence will not serve to deny to a vessel owner the benefits of the statute. *Earle & Stoddart, Inc.* v. *Ellerman's Wilson Line, Ltd.*, 287 U. S. 420, involved the fire statute, Act of March 3, 1851, c. 43, § 1, 9 Stat. 635; R. S. § 4282; Title 46, U. S. Code, § 181. That section provides that a shipowner shall not be liable for the loss of merchandise by fire unless caused by "the design or neglect" of such owner. A fire occurred on the *Galileo* because new bunker coal was placed on top of old which was known to be overheated, as a result of which the vessel was unseaworthy when the voyage began. The owners of the lost cargo contended that the fire statute was intended to exonerate the shipowner except for his "personal negligence * * * or, in case of a corporate owner, negligence of its managing officers or agents" (pp. 424-5), but contended* that the statute did not confer immunity where the fire resulted from unseaworthiness discoverable by the exercise of ordinary care. This contention is substantially identical with that of petitioners here. This Court declined to accept that contention and held that the "design or neglect" of the shipowner must be personal to deprive him of the benefits of the statute, saying:

"The Courts have been careful not to thwart the purpose of the fire statute by interpreting as 'neglect' of the owners the breach of what in other connections is held to be a non-delegable duty. Nothing contained in the opinion of this Court in *The Malcolm Baxter, Jr.*, 277 U. S. 323, is to be taken as indicating a different view" (pp. 427-8).

* Counsel who represented cargo in that case represent the petitioners here and make the same argument.

The fire statute and the limitation statute were §§ 1 and 3, respectively, of the Act of March 3, 1851. There is no reason to suppose that Congress intended that the "design or neglect" of the fire statute must be personal, but that the "privity or knowledge" of the limitation statute need not be personal but may be imputed. If the distinction between an individual and a corporate shipowner is understood there is no difficulty in applying the decisions. In all instances the "design or neglect" and the "privity or knowledge" must be personal to deprive the shipowner of the statutory benefits. In the case of an individual shipowner the "design or neglect" or the "privity or knowledge" must actually be personal to the individual shipowner. In the case of corporate shipowners, since a corporation has no physical being, the "design or neglect" or the "privity or knowledge" must be personal to those natural persons who are in law the corporation, i. e., persons having managerial status as declared in *Craig* v. *Continental Ins. Co.*, 141 U. S. 638, *supra*.

If petitioners' *alter ego* theory were sound it would destroy the limitation statutes as fully as if Congress repealed them. On petitioners' theory an individual can never limit his liability. If he does not entrust the vessel to another to manage for him, any privity or knowledge will necessarily be his own and he cannot limit. If he does place the vessel in the hands of another to operate for him, no matter how competent such person may be, the owner cannot limit because the privity or knowledge of such person will be his through his *alter ego*.

There are thousands of individually owned gasoline power boats in the United States, and a large industry which has proved of great value to the war effort in the construction of small fighting craft has grown up, fostered

by the settled law that an individual vessel owner can limit liability unless he has personal privity or knowledge. If the wisdom of the law were open to question, such considerations would be for the Congress.

Even if petitioners' *alter ego* theory were sound respondent is entitled to limit liability because his *alter egos* had no privity or knowledge. His *alter egos*, as petitioners claim, were Scott, Hawkins and Riley (Petitioners' Brief, pp. 46-9). It is clear from the record that these men never made or undertook to make any inspection of the *Seminole* personally and that none of them was aboard the *Seminole* following her delivery to Pilkington in April, 1935. Patently they had no actual knowledge of any defective condition and inasmuch as they had instituted two independent and adequate systems of inspection by competent persons (Baker and Pilkington, this brief, pp. 46-7) neither they nor Phipps can be charged with what proper inspections would have revealed even if the Courts below had found either that the inspections were not proper or that proper inspections would have revealed the allegedly defective condition. In fact, it was found below that the inspections were proper and were made by competent men (R. 3647) and that inspections by Pilkington which did not reveal the alleged defect were nevertheless adequate (R. 3588).

Petitioners complain because the District Court held that if an owner's negligence consists of non-feasance he may nevertheless limit his liability. The District Court's primary interest in non-feasance was in connection with liability as distinguished from limitation. The Court said:

"Furthermore, the character of the negligence which this record discloses is the failure to do or perform a duty, or

non-feasance. Such failure of duty does not give rise to an application of the alter ego or agency doctrine" (R. 3587).

This is good law. A corporate stockholder or officer is not individually liable to a third party injured by the corporation's tort for non-feasance, but only for his own participation therein. See *Leonard* v. *St. Joseph Lead Co.*, 75 F. (2d) 390 (C. C. A. 8); *Sterns Lumber Co.* v. *John H. Rice Co. et al.*, 260 Fed. 434; *The U. S. 219*, 21 F. Supp. 466; *Haefeli* v. *Woodrich Engineering Co., Inc.*, 255 N. Y. 442; *Greenauer* v. *Sheridan-Brennan Realty Co.*, 224 App. Div. 199; *Tibbets* v. *Wentworth*, 248 Mass. 468; *Aubrey's Adm.* v. *Stimson*, 160 S. W. 991 (Ky.); *Wolfersberger* v. *Miller*, 327 Mo. 1150; *Darling & Co.* v. *Fry*, 24 S. W. (2d) 722; *Ellingson et al.* v. *World Amusement Service Ass'n*, 222 N. W. 335 (Minn.); *Messenger* v. *Frye*, 28 P. (2d) 1023 (Wash.); *Federal Trade Commission* v. *Standard Education Soc.*, 86 F. (2d) 692 (C. C. A. 2).

III. The decree of the Circuit Court of Appeals should be affirmed, with costs.

Respectfully submitted,

CHAUNCEY I. CLARK,
EUGENE UNDERWOOD,
Counsel for Respondent.

Dated, New York, N. Y., December 7, 1942.

Appendix A

The statutes in effect at the time* of the fire were as follows:

"The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending" (Act of March 3, 1851, c. 43, § 3, 9 Stat. 635; R. S. § 4283; Title 46, U. S. Code, § 183).

"Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto" (Act of February 27, 1877, c. 69, § 1, 19 Stat. 251; R. S. §4284; Title 46, U. S. Code, § 184).

In *Providence and New York SS. Company* v. *Hill Mfg. Company*, 109 U. S. 578, this Court said:

"The rule of limited liability prescribed by the Act of 1851 is nothing more than the old maritime rule administered in courts of admiralty in all countries except England, from time immemorial; * * *" (p. 593).

*The limitation statutes as amended subsequent to the time of petitioners' losses are set forth in Appendix A to petitioners' brief, pp. 51-6. It is not suggested by petitioners, however, that these subsequent amendments affect this case.

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SUPREME COURT OF THE UNITED STATES.

No. 246.—October Term, 1942.

Charles Coryell, et al., Petitioners, *vs.* John S. Phipps and George J. Pilkington.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 4, 1943.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioners instituted a suit in Admiralty in the federal District Court to recover damages for the destruction of vessels owned by them as a result of a fire which occurred in June, 1935, while the vessels were afloat at Pilkington's storage basin at Fort Lauderdale, Florida. The fire was caused by an explosion of gasoline fumes in the engine room of the yacht Seminole, registered in the name of Seminole Boat Co. and owned by it. Prior to 1929 the Seminole was owned by respondent Phipps and his brother. At that time they transferred the yacht to the Seminole Boat Co., a Delaware corporation, all of the stock of which was issued to the two brothers. At the time of the fire respondent Phipps still owned half of the shares of stock, the other half having been acquired by his sister. Neither she nor Phipps was an officer or director of the company.

Respondent Phipps was sued on the theory that he was the owner of the yacht and operated and controlled her and that the Seminole Boat Co. was a dummy corporation. In his answer Phipps set up, *inter alia*, the defense of limitation of liability contained in R. S. § 4283, 46 U. S. C. § 183.[1] The District Court found negligence on the part of the Seminole Boat Co. It held that the corporation was not a sham or a fraud but adequate to insulate Phipps as a stockholder from liability for this tort. It went on to hold that even if the corporation be disregarded Phipps

[1] That section as it read at the time of the fire provided: "The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

was without "privity or knowledge" of the events which caused the fire and hence could limit his liability to the value of his interest in the yacht. 39 F. Supp. 142. The Circuit Court of Appeals affirmed. 128 F. 2d 702. The case is here on a petition for a writ of certiorari which we granted because of an asserted conflict on the point of limitation of liability under § 4283 between the decision below and *In re New York Dock Co.*, 61 F. 2d 777 and *In re Great Lakes Transit Corp.*, 81 F. 2d 441.

The sole questions raised by the petition relate to the liability of Phipps. Petitioners renew here their contention that the corporate existence of the Seminole Boat Co. should be disregarded and that it should be treated as a mere dummy or sham. We need not recite the facts on which that argument rests nor express an opinion on it. For even if we assume, without deciding, that the contention is a valid one and that Phipps should be treated as owner of the yacht for the purposes of this litigation, we nevertheless conclude that the courts below were correct in allowing the limitation of liability under § 4283.

That section, as it read at the time of the fire,[2] provided as we have stated, that the "liability of the owner" might be limited to the "amount or value of the interest of such owner" in the vessel, where the loss was occasioned or incurred without his "privity or knowledge". The District Court found that the proximate cause of the fire was the presence of gasoline fumes in the engine room caused by a leak in some part of the machinery or equipment. That leak, it concluded, occurred not from faulty original installation of the gasoline tanks but with the passage of time. The Circuit Court of Appeals sustained those findings. It was not found by either of the courts below, nor is it claimed, that Phipps had knowledge of that condition. It is urged, however, that the agents of Phipps and the Seminole Boat Co. selected to manage and inspect the yacht were incompetent and negligent, that their negligence is attributable to Phipps, and that in any event he could not establish his claim for limitation of liability without showing that he had appointed competent persons to make the inspection. See *M'Gill* v. *Michigan S. S. Co.*, 144 Fed. 788; *In re Reichert Towing Line*, 251 Fed. 214; *The Silver Palm*, 94 F. 2d 776. The Circuit Court of Appeals found that the vessel had been examined and pronounced fit by an experienced ship surveyor in February, 1935, that she developed no faults

[2] No question has been raised here as respects the amendments to the section made by the Act of August 29, 1935, 49 Stat. 960 or by the Act of June 5, 1936, 49 Stat. 1479.

in a cruise between February and April of that year when she was turned over to Pilkington for storage, that "the crew left her gasoline valves closed, her electric switches open, her gas tanks registering empty, and her bilges clean and free of gasoline or gasoline vapor," and that "she was repeatedly examined by competent men between April 15 and June 24, 1935, who discovered nothing wrong with her." There is evidence to support those findings and we will not disturb them. Thus respondent has satisfied the burden of proof, which is on those who seek the benefit of § 4283, of establishing the lack of privity or knowledge (*M'Gill* v. *Michigan S. S. Co., supra; In re Reichert Towing Line, supra; The Silver Palm, supra*) and is entitled to limit his liability, unless any neglect of those to whom duties were delegated may be attributed to him for purposes of § 4283.

Petitioners press several lines of cases on us. We are not concerned here, however, with the question of limitation of liability where the loss was occasioned by the unseaworthiness of the vessel. The limitations acts have long been held not to apply where the liability of the owner rests on his personal contract. *Pendleton v. Benner Line*, 246 U. S. 353; *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139; *Capitol Transportation Co.* v. *Cambria Steel Co.*, 249 U. S. 334. As stated by Chief Justice Hughes in *American Car & Foundry Co.* v. *Brassert*, 289 U. S. 261, 264, "For his own fault, neglect and contracts the owner remains liable." And that exception extends to an implied as well as to an express warranty of seaworthiness. *Cullen Fuel Co., Inc.* v. *Hedger Co.*, 290 U. S. 82. But whatever limit there may be to that exception (*id.*, p. 89; cf. *Earle & Stoddart, Inc.* v. *Ellerman's Wilson Line, Ltd.*, 287 U. S. 420, arising under the fire statute), those cases are no authority for imputing to the individual owner the neglect of another so as to establish on his part privity within the meaning of the statute.

Petitioners also rely on cases involving corporate shipowners. In those cases it is held that liability may not be limited under the statute where the negligence is that of an executive officer, manager or superintendent whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred. *Spencer Kellogg & Sons, Inc.* v. *Hicks*, 285 U. S. 502, and cases cited; 3 Benedict, Admiralty (6th ed.) § 490. But those cases are no authority for holding that the negligence of a subordinate may be imputed to an individual owner so as to place him in privity within the meaning of the statute. A corporation necessarily acts through human beings. The privity

of some of those persons must be the privity of the corporation else it could always limit its liability. Hence the search in those cases to see where in the managerial hierarchy the fault lay.

In the case of individual owners it has been commonly held or declared that privity as used in the statute means some personal participation of the owner in the fault or negligence which caused or contributed to the loss or injury. *The 84-H*, 296 Fed. 427; *Warnken* v. *Moody*, 22 F. 2d 960; *Flat-Top Fuel Co.* v. *Martin*, 85 F. 2d 39; and see *La Bourgogne*, 210 U. S. 95, 122; *Richardson* v. *Harmon*, 222 U. S. 96, 103; 3 Benedict, Admiralty (6th ed.) § 489. That construction stems from the well settled policy to administer the statute not "with a tight and grudging hand" (Mr. Justice Bradley in *Providence & New York S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 589) but "broadly and liberally" so as "to achieve its purpose to encourage investments in shipbuilding and to afford an opportunity for the determination of claims against the vessel and its owner." *Just* v. *Chambers*, 312 U. S. 383, 385. And see *Larson* v. *Northland Transportation Co.*, 292 U. S. 20, 24; *Flink* v. *Paladini*, 279 U. S. 59, 62; *Richardson* v. *Harmon*, *supra*, p. 103. Some cases, however, have barred the individual owner from the benefits of the statute even though the element of personal participation in the fault or negligence was not present. Thus it has been thought that the scope of authority delegated by an individual owner to a subordinate may be so broad as to justify imputing privity (*In re New York Dock Co.*, *supra*, p. 779) as well as knowledge. *In re Great Lakes Transit Corp.*, *supra*, p. 444. We need not reach those questions in this case. Privity like knowledge turns on the facts of particular cases. Here two courts have found the absence of both. We accept concurrent findings upon such matters. *Just* v. *Chambers*, *supra*, p. 385. And even were we to assume without deciding that for the purposes of § 4283 privity as well as knowledge of an individual owner may be constructive rather than actual, it does not follow that Phipps should be barred from limiting his liability. One who selects competent men to store and inspect a vessel and who is not on notice as to the existence of any defect in it cannot be denied the benefit of the limitation as respects a loss incurred by an explosion during the period of storage, unless "privity" or "knowledge" are to become empty words. If § 4283 does not give protection to the individual owner in these circumstances, it is difficult to imagine when it would.

Affirmed.